

OCT 13 1948

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1948.

**No. 348**

CURTIS D. MacDOUGALL, et al.,

*Plaintiffs-Appellants.*

VS.

DWIGHT H. GREEN, Individually and as Governor of  
the State of Illinois, et al.,

*Defendants-Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.

**APPELLANTS' MOTION TO ADVANCE AND EXPE-  
DITE THE HEARING AND DISPOSITION OF THIS  
CAUSE UPON SUGGESTION THAT IT INVOLVES  
A SUBSTANTIAL CLAIM OF CONSTITUTIONAL  
RIGHT TO HAVE THE NAMES OF PROGRESSIVE  
PARTY CANDIDATES FOR STATE AND FEDERAL  
OFFICES PRINTED ON THE BALLOTS OF ILLINOIS  
AT THE NOVEMBER 2, 1948 ELECTION**

and

**BRIEF IN SUPPORT THEREOF.**

JOHN J. ABT,  
H. B. RITMAN,  
RICHARD F. WATT,  
EDMUND HATFIELD,  
MILTON T. RAYNOR,  
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*Attorneys for Plaintiffs-Appellants:*

MALCOLM P. SHARP,  
The Law School, University  
of Chicago,  
*Of Counsel.*

## NOTICE AND PROOF OF SERVICE.

Please take notice that on 13th day of October, A.D. 1948, or as soon thereafter as the convenience of the Court will permit, we shall present to the United States Supreme Court in Washington, D. C., in the above-entitled cause, a Motion to Advance and Expedite the Cause and a Brief in Support Thereof, a copy of which is served upon you herewith. At which time you may appear or be represented by counsel if you so see fit.

JOHN J. ABT,  
H. B. RITMAN,  
RICHARD F. WATT,  
EDMUND HATFIELD,  
MILTON T. RAYNOR,  
BERNARD WEISSBOURD,

By.....  
*Attorneys for Plaintiff-Appellants.*

Received true and exact copies of the Motion to Advance and Expedite the Cause and a Brief in Support Thereof and of this Notice and Proof of Service this ..... day of October, 1948.

.....  
*Attorney-General, State of Illinois.*

.....  
*Attorney, County Clerk of Cook County.*

.....  
*Attorney, City Clerk of City of Chicago.*

.....  
*Attorney for Michael J. Flynn, individually.*

.....  
*Attorney for Board of Election Commissioners, City of Chicago, and Commissioners.*

**AFFIDAVIT OF SERVICE.**

..... being duly sworn,  
deposes and says that he is one of the Attorneys in the  
above-entitled cause, that he gave notice of the Motion to  
Advance and Expedite the Cause by sending on October 12,  
1948 a telegraphic notice of said Motion to each party of  
record and by depositing on October 12, 1948 in a United  
States Mail Box in the City of Chicago a copy of said  
Motion addressed to each party of record.

.....  
Subscribed and sworn to before me by .....

....., who is to me personally known,

this ..... day of October, A. D. 1948.

.....  
*Notary Public.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1948.

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No.

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CURTIS D. MacDOUGALL, et al.,  
*Plaintiffs-Appellants,*

vs.

DWIGHT H. GREEN, Individually and as Governor of  
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*Defendants-Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.

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**APPELLANTS' MOTION TO ADVANCE AND EXPEDITE THE HEARING AND DISPOSITION OF THIS CAUSE UPON SUGGESTION THAT IT INVOLVES A SUBSTANTIAL CLAIM OF CONSTITUTIONAL RIGHT TO HAVE THE NAMES OF PROGRESSIVE PARTY CANDIDATES FOR STATE AND FEDERAL OFFICES PRINTED ON THE BALLOTS OF ILLINOIS AT THE NOVEMBER 2, 1948 ELECTION.**

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**THE OBJECT OF THIS MOTION.**

This case, as more fully appears immediately *post*, involves claims of a federal right by the Progressive Party in Illinois, its members and candidates for office, which claims the Attorney General of Illinois concedes to be not merely substantial but well founded and entitling appellants to relief, grounded upon United States constitu-

tional provisions and statutes, to have the names of its candidates for President, Vice-President, United States Senator, and state officers printed on the November 2, 1948, Illinois state ballot.

The Attorney General of Illinois stated in open court through his assistant, Mr. William C. Wines, not only that appellants' jurisdictional claims were substantial, but that in the Attorney General's opinion, the appellants were entitled to a decree in substantial conformity with the prayer of their complaint.

The printing of Illinois ballots is now in progress in Illinois' 102 counties. The deadline for printing absentee ballots has already passed. It is of urgent import that this cause be decided at the earliest moment that the Court's convenience will permit.

This motion is for such order of this Court as will advance and expedite the hearing and decision of this cause in the light of the emergency that the case presents. Specifically appellants move:

- 1) That the time permitted under paragraph 3 of Rule 12 of the Rules of this Court for the filing of a statement in opposition to the appellants' Statement of Jurisdiction be reduced to three days;
- 2) That Briefs be made due on Saturday, October 16th;
- 3) That oral argument be had on Monday, October 18th or the first day thereafter convenient to the Court;
- 4) That the appeal be heard on the typewritten short record certified to this Court by the Clerk of the District Court.

### The Constitutional Questions Presented.

This cause presents to this Court the following very important constitutional questions, which vitally affect the electoral franchise of Illinois voters in the coming presidential, senatorial, and state elections:

Prior to 1935, the statute authorizing the formation of new state-wide political parties in Illinois required, *inter alia*, that at least 25,000 electors sign a document authorized and prescribed by the statute and usually called a Declaration of Intention to Form a New Political Party. (Smith-Hurd Rev. Stat., 1933, Chap. 46, par. 291.) In 1935, the statute was amended so that, although the requirement of at least 25,000 signatures was retained, there was added to it the further requirement that at least 200 signatures be obtained from each of at least 50 of the 102 counties of the state. (Ill. Rev. Stat., 1948, Chap. 46, par. 10-2.)

In view of the enormous variation in the populations of Illinois' 102 counties, more than half of the state's electorate living in Cook County alone, as against many counties with less than 10,000 electors, the question arises: **Does the requirement that at least 200 signatures be obtained from each of at least 50 counties so far deny equality in voting power and therefore in electoral potential as to violate one, some, or all of the Federal and Illinois constitutional provisions guaranteeing due process of law, equal protection of the law, the privileges and immunities of citizens of the United States, and free and equal elections?**

Inasmuch as the Progressive Party nominating petition named a candidate for the office of United States Senator, to be voted on at the general election of November 2, 1947, a further constitutional question is presented: **Does the requirement that such a petition contain at least 200 signatures from each of at least 50 counties violate Amendment XVII to the United States Constitution which provides that United States Senators from each state shall be "elected by the people thereof"?**

It is important to note that inasmuch as the only provision assailed as unconstitutional, that is, the provision requiring that at least 200 signatures be obtained from each of at least 50 counties, was added to the former act by way of amendment, the deletion of that amendment as unconstitutional would leave intact the legislation in its original form. The invalidation of the amendment would not nullify the whole statute. *People v. Altierie*, 356 Ill. 307 (1934).

### **The Nature of the Proceedings in the District Court.**

The proceedings in the District Court were closely modeled on those in *Colegrove v. Green*, 328 U. S. 549, in which this Court entertained arguments as to the constitutionality of the Illinois 1901 Reapportionment Act. Four of the seven justices participating in this Court's decision in *Colegrove v. Green* declared that federal courts had jurisdiction to act in equity by declaratory judgment, injunction, or otherwise in cases wherein it was contended that a state statute resulted in so gross an inequity in voting power as to deny equal protection or other constitutional rights.

Accordingly, appellants filed a suit in the District Court for the Northern District of Illinois for declaratory judgment, injunction and other relief. The case was heard by a bench of three judges in accordance with the provisions of sections 2281 and 2284 of the new Judicial Code.

On October 11, 1948, the District Court denied appellants' motion for a temporary injunction and dismissed the complaint. This appeal follows.

Although *Colegrove v. Green* indicates that resort need not be had to the state courts where the rights claimed arise directly under the Constitution and laws of the United States, a convincing demonstration appears in the **Brief in Support of This Motion** of appellants' diligent efforts to

secure relief in the Illinois courts. In that Brief will also be found an explanation why appeal to or application for this Court's writ of certiorari to the Illinois Supreme Court proceedings would have been unavailing until long after the election was over.

Respectfully submitted,

CURTIS D. MACDOUGALL, ET AL.,  
*Plaintiffs-Appellants,*

By: JOHN J. ABT,  
H. B. RITMAN,  
RICHARD F. WATT,  
EDMUND HATFIELD,  
MILTON T. RAYNOR,  
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By.....  
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*Of Counsel.*

**BRIEF IN SUPPORT OF THE MOTION.**

---

**Reference to the Motion For a Statement of the Nature of the Case and of the Questions Presented.**

The Nature of the Case and of the Questions Presented sufficiently appears from the Motion, *ante*. For a fuller exposition see the appellants' **Statement of Jurisdiction**.

## ARGUMENT.

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### I.

**The questions presented are substantial. Federal Courts have jurisdiction to decide them.**

The Attorney General of Illinois conceded in open court that in his opinion the 1935 Amendment to the Illinois Election Code so far frustrated substantial equality of electoral potential as to deny equal protection and due process of law. He also conceded that the amendment, which withholds from 87 per cent of the voters the right to nominate a candidate for United States Senator, contravenes the plain import of the Seventeenth Amendment.

Appellants contended, and the Attorney General conceded, that four of the seven Justices of this Court who participated in the decision of *Colegrove v. Green*, 328 U. S. 549, recognized federal courts' equity jurisdiction to act, by declaratory judgment or injunction, in cases where the state statute, if enforced, would deny federal constitutional rights in the matter of an election for federal office. This was true although Mr. Justice Rutledge concurred in the judgment of the Court upon the sole ground that in *Colegrove v. Green* the 'exigencies' of the case required forbearance of the exercise of this jurisdiction.

### **United States Constitutional and Statutory Provisions Involved.**

Appellants think that a state statute which so far frustrates popular sovereignty in the matter of nominating candidates for any office, state or federal, that 87 per cent of the voting population located in Illinois 49 most popu-

lous counties could not, even by unanimous petition, nominate a single officer, while granting to 25,000 citizens in 50 less populous counties the right to make such nomination, denies equal protection and due process of law and abridges the privileges and immunities of citizens of the United States in contravention of the Fourteenth Amendment.

Appellants also contend that, with particular respect to the office of United States Senator, the Seventeenth Amendment, which in effect requires United States Senators to be elected at large, contemplates that there must be a substantial equality in electoral potential, not only with regard to the casting of votes but with respect to the making of nominations. Therefore, even if the Fourteenth Amendment is not applicable, at least with respect to the office of United States Senator, the Seventeenth Amendment inhibits any such discrimination as that embodied in the Illinois amendment under attack in this case.

The case presents an alternative contention, which will be reached only if appellants' constitutional claims are not sustained, namely, that under a proper construction of the Illinois Election Code, the Illinois State Officers Electoral Board transcended its administrative authority under relevant Illinois acts when it held that persons who had voted in the Illinois primary election **for certain Republican or Democratic candidates for nomination were thereby disqualified from signing Progressive Party nominating petitions for the offices of presidential electors, inasmuch as presidential electors are not nominated at primary elections under Illinois law.**

## -II.

Appellants have exhausted all state remedies and have acted with all possible diligence in the assertion of their claims.

The Progressive Party, its candidates, and representatives of its large membership, filed a nominating petition with the office of the Secretary of State of the State of Illinois in accordance with the provisions of the Illinois Election Code (Ill. Rev. Stat., 1947, Chap 47, Sec. 10-2).

On August 31, 1948, the State Officers Electoral Board held this petition insufficient solely on the ground that it did not contain 200 signatures of qualified voters from each of at least 50 Illinois counties.

On September 13, 1948, the first day that the Illinois Supreme Court was in session, the Progressive Party, its candidates and representatives, sought leave to file an original petition for writ of mandamus in the Supreme Court of Illinois to compel the printing of their names upon the ballot. Leave to file this petition was denied without opinion and without the respondents having been impleaded. Obviously, petitioners could not seek certiorari to review that action, *first*, because even if this Court should grant certiorari and reverse, all that it could do upon an order denying leave to file the petition would be to remand it with directions to permit the respondents to answer and be heard, with the result that by the time the matter could be disposed of in the Illinois Supreme Court and certiorari sought and acted on here with respect to such final disposition, the election would long since have been over; and *second*, because this court lacks jurisdiction to review an order of the Supreme Court of Illinois merely denying leave to file a petition for original remedy. *White v. Ragen*, 324 U. S.

760. A second motion for leave to file a petition for mandamus was denied, again without opinion, on September 24, 1948.

The complaint was filed in the District Court on September 24, 1948 and the motion for an interlocutory injunction was argued on October 4, 1948.

### III.

**There is precedent for this Court's speedy action in election cases such as this.**

In *Wood v. Brown*, 287 U. S. 1, an appeal was filed in this Court on October 2. Briefs were submitted on October 11 and oral argument was heard on October 13. The Court announced its decision on October 18.

In *McPherson v. Blacker*, 146 U. S. 1, a motion to advance the cause was filed on the second day of Term, October 11, and was granted at once. The cause was heard on that day and the decision rendered on October 17. (See the report at page 4.)

The appellants respectfully represent that the emergency here presented is equally great.

**PRAYER OF THE MOTION.**

For the reasons indicated above, appellants respectfully move this Court for such order of this Court as will advance and expedite the hearing and disposition of this cause at the earliest time convenient to this Court.

Respectfully submitted,

JOHN J. ABT,  
H. B. RITMAN,  
RICHARD F. WATT,  
EDMUND HATFIELD,  
MILTON T. RAYNOR,  
BERNARD WEISSBOURD,  
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MALCOLM P. SHARP,  
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OCT. 16 1948.

CHARLES ELMORE WETLEY

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**APPELLANTS' BRIEF AND ARGUMENT.**

JOHN J. ABT,  
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EASTERN DIVISION.

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**APPELLANTS' BRIEF AND ARGUMENT.**

---

**THE DECISION BELOW.**

This appeal is from an order, dated October 11, 1948, of a three-judge court denying the Appellants' motion for an interlocutory injunction and dismissing the complaint in a civil suit assailing as unconstitutional an Illinois statute. There is no official report of the opinion. The Findings of Fact and Conclusions of Law entered by the court are appended to this Brief as Appendix "A".

## **JURISDICTION OF THIS COURT ON DIRECT APPEAL.**

The jurisdiction of this Court on direct appeal rests on Section 1253 of the new Judicial Code (28 U. S. C. Sec. 1253), effective September 1, 1948, which provides:

“Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”

The Appellants sought in their complaint and motion for an interlocutory injunction to restrain the enforcement and operation of a state statute by restraining the action of Illinois state officers in the application of a ruling made by the Illinois State Officers Electoral Board acting under such statute, on the ground that the statute involved was unconstitutional. A suit of this type must be heard and determined by a three-judge district court pursuant to Sections 2281 and 2284 of the new Judicial Code. The court denied the interlocutory motion and dismissed the complaint.

## STATEMENT OF THE CASE.

### State of the Record.

The order of the district court was entered, after notice and hearing, on the Appellants' sworn complaint as amended and motion for an interlocutory injunction. Defendants submitted no affidavits in opposition to this motion and raised no questions of fact in connection therewith. No answers were filed by any of the defendants with the exception of the Board of Election Commissioners of the City of Danville and the individual Commissioners. This answer, filed four days after the hearing in district court, admitted the allegations of fact in the Appellants' complaint and merely denied the conclusions of law.

The district court denied the motion for an interlocutory injunction and, on its own motion, dismissed the complaint. On this state of the record the allegations of the complaint must be taken as true, and the district court so stated at the opening of the hearing on the motion for an interlocutory injunction.

### The Parties.

The Appellant Curtis D. MacDougall is a citizen and resident of the State of Illinois and Progressive Party candidate for the office of United States Senator from the State of Illinois.

The Appellants Alice L. Boyd, Boris Brail, Grace Clark Brown, Charles H. Coyle, Charles Fischer, Florence Gowgeil, Alfred W. Israelstam, Joseph Kalika, Mandall Kaplan, Eugene A. Kazmark, Faye Langerman, Iris Lewin, Ralph K. Meister, Frank Opal, Herbert Pinzke, Pauline K. Reed, Samuel Rosenberg, John C. Ross, Isadore H. Shapiro, Alice L. Smith, Pasko Soso, Hans A. Spading, David Spitzner,

Boris Steinberg, Donald C. Teigland, Bliss W. Tuttle, Frank Vettorel, and Nelson M. Willis are citizens and residents of the State of Illinois and Progressive Party candidates for the offices of Electors of President and Vice President of the United States from the State of Illinois.

The Appellants Oakes, Diehl, Reed, McDonough, Nebgen, Hesson, Blaine, Cassill, and Wakefield are citizens and residents of the State of Illinois and Progressive Party candidates for state offices in the State of Illinois.

The Appellant Progressive Party is an organization of qualified voters of the State of Illinois desirous of forming a new state-wide political party to be known as The Progressive Party and of placing the names of Progressive Party candidates on the official ballots to be used at the November 2, 1948 general election.

The Appellants Garfield, Andich, and Holtzman are citizens and registered voters of the State of Illinois.

The Appellees Green, Lueder, and Barrett are state officers of the State of Illinois whose duty it is under Article 10 of the Illinois Election Code to certify to the County Clerks the names of candidates entitled to appear on the official ballots, but who, where objections to nominating petitions are filed, are required by statute to follow and abide by the ruling of the State Officers Electoral Board. The Appellees County Clerks, Boards of Election Commissioners, and members of Boards of Election Commissioners are charged with specific duties under the Illinois Election Code in connection with the preparation of ballots and the certification of the names of candidates entitled to appear on said ballots.

### **Brief Statement of the Constitutional Issues.**

This appeal presents to this Court important constitutional questions involving the right of qualified voters of the State of Illinois to form a new political party and nominate candidates for Electors of President and Vice-President of the United States, United States Senator, and state officers. Under the Illinois Election Code, a petition to form a new state-wide political party and to nominate candidates of such new party must be signed by at least 25,000 qualified voters, including at least 200 from each of at least 50 counties. **The Appellants contend that the requirement of at least 200 signatures from each of at least 50 counties, added by amendment in 1935, violates the privileges and immunities, equal protection, and due process clauses of the Fourteenth Amendment, the Seventeenth Amendment, and Section 18 of Article II of the Illinois Constitution which provides that "All elections shall be free and equal."**

### **The Progressive Party Nominating Petition and the Proceedings before the Illinois State Officers Electoral Board.**

On August 16, 1948 there was filed in the office of the Secretary of State of the State of Illinois a "Declaration of Intention to Form a New State-wide Political Party and a Petition to Nominate Candidates of Said Party" under the party name "Progressive Party", in accordance with the provisions of Article 10 of the Illinois Election Code. *Ill. Rev. Stat., 1947, Chap. 46, Art. 10.* The petition bore more than 75,000 signed names and nominated Progressive Party candidates for the offices of Electors of President and Vice-

President of the United States, United States Senator, and state-wide offices. (Complaint, pars. 14, 15, 16.)\*

Objections to the sufficiency of the petition were filed by opponents of the Progressive Party. (Complaint, par. 17.)

The principal contention of the objectors was that the Progressive Party petition did not contain at least 200 valid signatures from each of at least 50 counties. Other insufficiencies were alleged, but at the hearing before the State Officers Electoral Board this was the only objection pressed. In other words, the objectors relied on the 1935 amendment, which Appellants assail as unconstitutional in this case. (Complaint, pars. 26, 27.)

On August 26, 1948 the State Officers Electoral Board, provided for by Article 10 of the Illinois Election Code, met to determine the sufficiency of the nominating petition. (Complaint, par. 24.) The Board consisted of Arthur C. Lueder, Auditor of Public Accounts of the State of Illinois, Mr. Justice Wilson of the Illinois Supreme Court in place of the Attorney General, who was disqualified because he is a candidate for reelection, and Mr. Justice Gunn of the Illinois Supreme Court in place of the Secretary of State, who was adjudged by a declaratory judgment of the Circuit Court of Sangamon County to be disqualified because he is a candidate for reelection. (Complaint, pars. 22, 23, 24.)

The Board heard evidence pertaining to the objection that there were not at least 200 valid signatures from each of at least 50 counties in the State of Illinois. The issue presented for decision by the Board was whether the Progressive Party nominating petition complied with the provisions of the 1935 amendment to Section 2 of Article

\* Since this appeal is being heard on the typewritten short record, not now available to Appellants, references are to the relevant documents themselves.

10 of the Illinois Election Code. (Complaint, pars. 25, 26, 27.)

The objectors conceded before the State Officers Electoral Board that the Progressive Party nominating petition contained over 25,000 signatures of qualified Illinois voters. (Complaint, par. 26.) They also conceded, at the close of the proceedings, that the petition contained at least 200 valid signatures from 41 counties. In fact on the figures they themselves presented to the Board they conceded that the petition was short only a matter of between 83 and 110 signatures distributed over 9 counties. (Complaint, par. 48 and Exhibits E and F.)

The Board found as a matter of fact that the Progressive Party nominating petition did not bear at least 200 signatures of qualified voters from each of 50 counties. (Complaint, par. 28.) It therefore entered an order on August 31, 1948 (Complaint, Exhibit D), the material portions of which follow:

3. After the examination made of the petition filed by the said Progressive Party, and after hearing all the evidence on behalf of the objectors and on behalf of the said Progressive Party, this Electoral Board makes the following finding: **That the nominating petition filed on behalf of the said candidates of the Progressive Party does not include the signatures of 200 qualified voters from each of at least 50 counties within this state as required by statute for the nomination of said candidates for such public office, and is therefore insufficient in law as a nominating petition.**

It is, therefore, the decision of this Board that the purported petition of said candidates of the Progressive Party is not sufficient in law to entitle the said candidates' names to appear on the ballot, and the objections thereto are therefore sustained. (Emphasis added.)

It is clear that the only reason the candidates of the Progressive Party were ruled off the ballot was the in-

sufficiency of the nominating petition in one regard, and one regard only. The Board found that it lacked at least 200 valid signatures from each of at least 50 counties. The Board sustained no other objection and made no other finding as to the petition's insufficiency. (Complaint, par. 28.)

If this order is to stand, the Progressive Party's candidates will be barred from the ballot and Illinois voters who wish to vote for those candidates will be disfranchised from so voting at the November 2, 1948 general election.\*

### **Motions in the Illinois Supreme Court.**

Following this ruling the Appellants sought by two separate motions, on September 13, 1948 and September 23, 1948, to obtain leave to file petitions for mandamus in the Supreme Court of the State of Illinois in order to adjudicate the following two questions (Complaint, par. 29; Amendment to Complaint, par. 50a.):

(1) Does the requirement that at least 200 signatures be obtained from each of at least 50 counties so far deny equality in voting power and therefore in electoral potential as to violate one, some, or all of the Federal and Illinois constitutional provisions guaranteeing due process of law, equal protection of the law, the privileges and immunities of citizens of the United States, and free and equal elections?

(2) Does the provision of Section 4 of Article 10 of the Illinois Election Code which provides "that any person who has already voted at a primary election held to nom-

\* The candidates for President and Vice-President of the Socialist, Socialist-Labor and Prohibition parties will appear on the ballot in Illinois. These parties, like the Progressive Party, filed nominating petitions under Article 10 of the Illinois Election Code. Unlike the Progressive Party, however, these parties were not faced with objections as to the sufficiency of their petitions. In the absence of objections, their candidates were automatically certified for placement on the ballot.

inate a candidate or candidates for any office of offices, to be voted upon at any certain election, shall not be qualified to sign a petition of nomination for a candidate or candidates for the same offices, to be voted upon at the same certain election," disqualify a person who voted in the April 13, 1948 primary election from signing a Progressive Party nominating petition insofar as that petition seeks to nominate candidates for the offices of Electors of President and Vice-President of the United States, no candidates for such offices having been nominated at the April 13, 1948 primary election?

Under the Illinois Constitution the Illinois Supreme Court has original jurisdiction in mandamus. *Ill. Const. Art. VI, sec. 2*. In view of the shortness of the time prior to the election, the Appellants' efforts to get the Illinois Supreme Court to exercise that jurisdiction represented their sole opportunity for redress in the Illinois state courts.

The Illinois Supreme Court on September 14, 1948 and September 24, 1948 denied the motions for leave to file the petitions for mandamus, giving no grounds for its actions. (Complaint, par. 30; Amendment to Complaint, par. 50b.)

### **The Suit in the District Court.**

The Appellants did not attempt to review the rulings of the Illinois Supreme Court in view of the holding of this Court in *White v. Ragen*, 324 U. S. 760 (1945). On September 24, 1948, therefore, they filed a complaint for declaratory and injunctive relief in the District Court of the United States for the Northern District of Illinois, Eastern Division. The complaint raised both the questions previously sought to be presented separately by motions in the Illinois Supreme Court, and prayed an interlocutory injunction in effect requiring the defendant election officials

to place the names of the Progressive Party candidates on the ballots for use throughout the State of Illinois at the general election to be held on November 2, 1948. The cause was assigned to a three-judge court consisting of Circuit Judge Kerner and District Judges Igoe and Sullivan.

A hearing on the plaintiffs' motion for an interlocutory injunction was had on October 4, 1948. Briefs were filed by the plaintiffs and by some of the defendants and also by the American Civil Liberties Union as *amicus curiae*.

On October 11, 1948 the court rendered its decision denying the motion for an interlocutory injunction and dismissing the complaint. The court disposed of the merits by holding that the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code did not violate either the United States or Illinois Constitutions. Application for appeal to this Court was presented to the district court and granted on October 11, 1948.

### **SPECIFICATION OF ERRORS.**

The District Court erred in the following respects:

1. In denying Appellants' motion for an interlocutory injunction, and in failing to grant that motion.
2. In dismissing the complaint.
3. In holding that the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code does not violate any provision of the United States Constitution or Section 18 of Article II of the Constitution of Illinois.
4. In holding that the court was without jurisdiction to inquire into the decision of the Illinois State Officers Electoral Board of August 31, 1948, and in failing to hold that the relief prayed for may be granted notwithstanding that decision.

## SUMMARY OF APPELLANTS' CONTENTIONS.

Prior to 1935, the statute authorizing the formation of new state-wide political parties in Illinois required, *inter alia*, that at least 25,000 electors sign a document authorized and prescribed by the statute and usually called a Declaration of Intention to Form a New Political Party and a Petition to Nominate Candidates of Said Party. *Smith-Hurd Rev. Stat., 1933, Chap. 46, par. 291.* In 1935, the statute was amended: the requirement of at least 25,000 signatures was retained, but there was added to it the following proviso:

"Provided; that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties."

The original text of this amendment will be found in the Illinois Session Laws for 1935 at page 789; it is now part of Section 2 of Article 10 of the Illinois Election Code. *Ill. Rev. Stat., 1947, Chap. 46, sec. 10-2.* Hereafter it will be referred to as the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code.\*

This section provides the only means whereby qualified voters in Illinois can form a new political party and nominate candidates of such new party for Electors of President and Vice-President of the United States, United States Senator, and state-wide offices. An identical requirement is contained in Section 3 of Article 10 of the Illinois Election Code with regard to the nomination of independent candidates for these offices. Thus new-party or independent nominations for these offices can be accomplished only by

\* This amendment has previously been before this Court. In a case very similar to this one, the appeal was dismissed after election on the ground of mootness. *Blackman v. Stone*, 300 U. S. 641 (1937). For further proceedings in the same matter see *Blackman v. Stone*, 101 F. 2d 500 (C. C. A. 7th, 1939).

means of a nominating petition, under Section 2 or 3 of Article 10 of the Illinois Election Code, containing a minimum of 25,000 signatures of qualified voters, including at least 200 from each of at least 50 counties. Voters who do not wish to participate in either the Democratic or Republican primaries have no opportunity to nominate candidates apart from these provisions of Article 10. The Illinois Election Code gives them this one method of nomination and no other.

In view of the enormous variation in the respective populations of Illinois' 102 counties, more than half of the state's electorate living in Cook County alone as against many counties with less than 10,000 electors, the Appellants submit that the requirement that at least 200 signatures be obtained from each of at least 50 counties so far denies equality in voting power and therefore in electoral potential as to violate one, some, or all of the Federal and Illinois constitutional provisions guaranteeing due process of law, equal protection of the law, the privileges and immunities of citizens of the United States, and free and equal elections.

Since voters of the established parties under the Primary Law *Article 7 of the Illinois Election Code* need not meet any requirement as to geographical distribution of the vote in primary elections in order to nominate candidates for Electors of President and Vice-President of the United States, United States Senator, and state offices, and since established parties need obtain only 5 per cent of the total vote cast throughout the state in order to remain legally established and to participate in subsequent primary and general elections, the Appellants submit that the requirement that at least 200 signatures be obtained from each of at least 50 counties for a new party or independent nominating petition discriminates against voters who may wish to form a new party or to nominate independent candidates, by

imposing an extremely difficult requirement as to geographical distribution, and in favor of voters of established parties, as to whom no such geographical distribution is imposed.

Inasmuch as the Progressive Party nominating petition named a candidate for the office of United States Senator to be voted on at the coming general election, the Appellants submit further that the requirement that such a petition contain at least 200 signatures from each of at least 50 counties violates Amendment XVII to the United States Constitution which provides that United States Senators from each state shall be "elected by the people thereof."

It is important to note that inasmuch as the only provision assailed as unconstitutional, that is, the provision requiring that at least 200 signatures be obtained from each of at least 50 counties, was added to the statute by way of amendment, the deletion of that amendment as unconstitutional would leave intact the legislation in its original form. The invalidation of the amendment would not nullify the whole statute. *People v. Alterie*, 356 Ill. 307 (1934).

If the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code is invalid, the Appellants are entitled to have the names of all their candidates appear on the ballots for the November 2, 1948 election, inasmuch as it is conceded that the petition of the Progressive Party meets all the requirements of Section 2 of Article 10, as in force prior to the 1935 amendment.

As an alternative to these constitutional questions, this appeal presents a problem of the proper construction of a portion of Section 4 of Article 10 of the Illinois Election Code. *Ill. Rev. Stat., 1947, Chap. 46, sec. 10-4*. The statutory language in question reads as follows:

"Provided further, that any person who has already voted at a primary election held to nominate a candi-

date or candidates for any office or offices, to be voted upon at any certain election, shall not be qualified to sign a petition of nomination for a candidate or candidates for the same offices, to be voted upon at the same certain election."

Candidates for the offices of Electors of President and Vice-President of the United States were not nominated at the April 13, 1948 primary election. Under Article 21 of the Illinois Election Code they are nominated by the legally established political parties by convention. It is therefore the contention of the Appellants that voters who participated in the April 13, 1948 primary election were not thereby disqualified from signing a petition nominating candidates for the offices of Electors of President and Vice-President of the United States. The Appellants alleged, and it was not denied, that were it not for the signatures disqualified because of the fact that the signers voted in the April 13, 1948 primary election, there would have been at least 200 valid signatures from each of 50 counties, with the result that the Progressive Party nominating petition would have been valid to nominate candidates for the offices of Electors of President and Vice-President of the United States.

On this view of the matter the Appellants are entitled to have the names of the Progressive Party candidates for President and Vice-President of the United States appear on the official ballots for use in the State of Illinois at the November 2, 1948 election.

## ARGUMENT.

### I.

The District Court properly had jurisdiction of this case and had the authority to grant the declaratory and injunctive relief prayed for in the complaint.

1. The District Court had original jurisdiction under Section 1343 of the new Judicial Code.

Section 1343 provides:

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

This provision is the present and slightly altered form of Section 24 (14) of the Judicial Code, 28 U. S. C. sec. 41 (14), which has its origin in the Civil Rights Act of April 9, 1866, 14 Stat. 27. Under this provision allegation and proof of the requisite jurisdictional amount are not necessary. *Hague v. C. I. O.*, 307 U. S. 496, 506-13 (1939).

The Appellants' cause of action arises under the Constitution of the United States, particularly Section 4 of Article I, Section 1 of Article II, Amendment XVII, and Amendment XIV. Suits such as the one brought here are authorized by the Civil Rights Act of 1871, 8 U. S. C. sec. 43s

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Appellees here are acting under color of the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code and the decision of the State Officers Electoral Board based upon it, in refusing to certify or print or cause to have printed the names of the candidates of the Progressive Party on the official ballots. The 1935 amendment and the action of the Appellees thereunder deprives Appellants of rights secured by the United States Constitution in the nomination of candidates to public office, i.e., the rights to equal protection of the law, due process of law, and the privileges and immunities guaranteed by Amendment XIV, and the right of the people to elect Senators guaranteed by Amendment XVII.

**2: The complaint stated a cause of action of a civil nature under the Declaratory Judgment Act.**

Section 2201 of the new Judicial Code, 28 U. S. C. sec. 2201, provides as follows:

"In cases of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The Appellants asked the district court, pursuant to the above provision, to hold and declare "that the provision of Section 2 of Article 10 of the Illinois Election Code added by amendment in 1935 requiring for a valid nominating petition at least two hundred (200) signatures of qualified voters from each of at least fifty (50) counties is unconstitutional in violation of both the United States and Illinois Constitutions. \* \* \*" (Complaint, page 14.)

The Appellants also asked for further relief as authorized by Section 2202 of the new Judicial Code:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The further relief requested was an order enjoining the various defendants from continuing to abstain from taking the steps required under the Illinois Election Code to place the names of the Progressive Party candidates on the official ballots for use throughout the State of Illinois at the general election to be held on November 2, 1948.

The complaint presented an actual controversy between Appellants and Appellees appropriate for determination under the declaratory judgment provisions of the Judicial Code. The Appellees are carrying out their duties, and intend to continue to do so, under a provision of the Illinois Election Code which the Appellants contend is unconstitutional. In the performance of these duties, Appellees are printing the ballots and making other preparations for the November 2, 1948 election without giving recognition to the rights of Progressive Party candidates to appear on the ballots. The Appellants contend that since this action deprives them of constitutional rights it should be restrained. Cf. *Colegrove v. Green*, 328 U. S. 549 (1946).

Declaratory judgment is an appropriate remedy for the protection of political rights. Professor Borchard, in his treatise *Declaratory Judgments*, at pages 868 *et seq.*, shows that declaratory judgment has been used in many instances to protect rights pertaining to elections, including the propriety or regularity of an election, the legality of its conduct, the statutory qualification or eligibility of the nominee, the term for which an officer has been elected, the duty to hold a new election; the right to vote, and the computation of the ballots.

See *Ekern v. Dammann*, 215 Wis. 394, 254 N. W. 759 (1934).

**3. The Complaint was a proper one for a hearing before a three-judge court.**

Wherever an application is made for an interlocutory or permanent injunction "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes," on the ground that the statute involved is unconstitutional, the application must be heard and determined by a three-judge district court. 28 U. S. C. sec. 2281-84.

The Appellants made such an application, as the complaint clearly shows. They therefore asked that the cause be assigned to a three-judge court and subsequently filed a motion to that effect. The motion was properly granted.

**4. Appellants have exhausted all state remedies that were in any real sense available to them.**

The Appellants do not concede that prior to initiating this suit to obtain redress for deprivation of a right protected by the United States Constitution they were obliged

to seek a remedy in the state courts. In fact this Court has held, in circumstances similar to those presented here, that a preliminary expedition to the state courts is not required. *Lane v. Wilson*, 307 U. S. 268, 274-75 (1939).

Nevertheless, as stated above, the Appellants did seek, by motions for leave to file petitions for mandamus in the Supreme Court of Illinois, under that court's original jurisdiction in mandamus, to raise the very issues subsequently presented to the district court. These motions were denied, without opinion or assignment of reasons for the denials. Clearly the Plaintiffs are unable to find relief in the state courts. In such circumstances the doctrine of *Railroad Commission v. Pullman Co.*, 312 U. S. 496 (1941), and *Chicago v. Fieldcrest Dairies*, 316 U. S. 168 (1942), has no applicability.

**5. Where a federal court has jurisdiction by reason of the existence of a substantial federal question, it has jurisdiction to decide all the questions in the case.**

In the leading case, *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175 (1909), a railroad company attacked an order of the state railway commission on the ground that the state statute involved was unconstitutional. The court declined to pass on the federal question presented, that of the statute's unconstitutionality, resting its decision on a construction of the state statute. This Court affirmed, saying, at page 191:

"The federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, and even if it omitted to decide them at all, but decided the case on local or state questions only."

This doctrine has recently been upheld. *Hurn v. Oursler*, 289 U. S. 238, 246 (1933); *Hillsborough v. Cromwell*, 326 U. S. 620, 629 (1946).

The rule has specifically been held applicable to proceedings involving applications for injunctions before three-judge courts. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298 (1913). Referring to the three-judge court provision, this Court said, at page 304:

"This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution; and the question of unconstitutionality in this sense must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore properly before the Circuit Court and the appeal brings them here."

From these authorities it is clear that the district court had jurisdiction to decide **all the questions** presented by the complaint. If necessary for the disposition of the case, it could have determined the proper construction of the portion of Section 4 of Article 10 of the Illinois Election Code brought into issue, even though that question is not a constitutional one and ordinarily would not be heard by a three-judge court.

It is likewise clear that the district court could have determined whether or not that part of Section 2 of Article 10 of the Illinois Election Code requiring, for a valid nomi-

nating petition, at least 200 signatures from each of at least 50 counties, is in violation of Section 18 of Article II of the Illinois Constitution.

In *Glenn v. Field Packing Co.*, 290 U. S. 177 (1933), this Court affirmed per curiam a decision of a three-judge district court holding a state statute invalid under the state constitution; the district court did not decide the federal question. Cf. *Sterling v. Constantin*, 287 U. S. 378, 393-94 (1932).

Concerning the jurisdiction of a federal court to adjudge a state statute in conflict with the state constitution in advance of any determination by the state courts, see *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 305 (1913); *Michigan Central R. R. v. Powers*, 201 U. S. 245, 291 (1906); *Pelton v. National Bank*, 101 U. S. 143, 144 (1880); *Union Pacific R. R. Co. v. Alexander*, 113 Fed. 347 (C. C. Colo., 1901).

## II.

The provision of Section 2 of Article 10 of the Election Code added by amendment in 1935 requiring 200 valid signatures from each of 50 counties constitutes an arbitrary, unreasonable, and discriminatory restriction on the right of qualified voters of the State of Illinois to nominate and vote for candidates of their own choice.

This provision was added by amendment in 1935. *Laws, 1935, p. 789*. Prior to that amendment the requirement as to signatures to nominate new-party candidates for presidential electors, United States Senator, and state-wide offices by petition under Article 10 was in terms of the total only: 25,000 signatures of qualified voters in the state. The effect of the 1935 amendment, therefore, was to add a further requirement to the already existing requirement.

And the new 1935 requirement unquestionably made compliance vastly more difficult, for no longer would any 25,000 valid signatures suffice. The 1935 amendment made it mandatory that that total meet a further and very exacting requirement as to geographical distribution. At least 200 valid signatures must come from each of 50 counties. The requirements for nominating independent candidates were similarly amended by the same act. **In other words, by reason of the operation of the 1935 amendment, 25,000 valid signatures or 4,000,000 valid signatures would not suffice to nominate new-party or independent candidates unless their geographical distribution was proper.**

Fully to appreciate the effect of this 1935 amendment requires a consideration of several facts as to the distribution of population in Illinois:

There are 102 counties in the State of Illinois.

**One county, Cook County, contains over 51 per cent of the total population and over 52 per cent of the registered voters of the entire state. (Complaint, par. 33.)**

**The five most populous counties, Cook, St. Clair, Peoria, Madison, and Kane, contain approximately 59 per cent of the total population of the entire state and approximately 59 per cent of the registered voters of the entire state. (Complaint, par. 34.)**

**The forty-nine most populous counties, Cook, St. Clair, Peoria, Madison, Kane, Winnebago, Lake, Sangamon, Will, Rock Island, DuPage, LaSalle, Vermilion, Macon, McLean, Champaign, Adams, Kankakee, Tazewell, Franklin, Knox, Williamson, Marion, Macoupin, Fulton, Henry, Whiteside, Stephenson, Livingston, Christian, Coles, Saline, Jackson, Bureau, McHenry, Morgan, Lee, Montgomery, DeKalb, Jefferson, Randolph, Iroquois, Ogle, Logan, Hancock, Fayette, McDonough, Shelby, and Alexander, contain approximately**

89 per cent of the total population of the entire state and approximately 87 per cent of the registered voters of the entire state. (Complaint, par. 35.)

The fifty-three remaining counties contain approximately 11 per cent of the total population of the entire state and approximately 13 per cent of its registered voters.

The forty-one counties in which at least two hundred qualified voters signed the Progressive Party petition, on the facts as conceded by the objectors themselves, contain over 80 per cent of the total population of the entire state and approximately 80 per cent of the registered voters of the entire state.\*

The 1935 amendment thus effectively prevents the more than 52 per cent of the state's registered voters who reside in Cook County from forming a new political party in the state and from nominating candidates for presidential electors, United States Senator, and state-wide offices under Article 10 of the Illinois election code.

The 1935 amendment likewise prevents the 59 per cent of the state's registered voters who reside in Cook, St. Clair, Peoria, Madison, and Kane Counties from forming a new political party in the state and from nominating candidates for presidential electors, United States Senator, and state-wide offices under Article 10 of the Illinois election code.

The 1935 amendment even prevents the 87 per cent of the state's registered voters who reside in the forty-nine most populous counties of the state from forming a new political party in the state and from nominating candidates for presidential electors, United States Senator, and state-wide offices under Article 10 of the Illinois Election Code. Yet

\* See Appendix B for detailed population and registration figures by counties.

25,000 of the remaining 13 per cent of the registered voters properly distributed among the fifty-three least populous counties could form a new party and nominate candidates for these offices.

Clearly the ultimate consequence of this 1935 amendment is to make the influence of a qualified voter in a populous county less than the influence of a qualified voter in a smaller county. For additional signatures over and above the required 200 in a large county will not make up for a lack of the 200 in any other county.

As a matter of fact, before the State Officers Electoral Board in this very case, it was conceded by the objectors that the Progressive Party petition contained sufficient signatures in 41 counties. Only 9 counties were short. And in the nine counties which were closest to meeting the required total of 200 signatures, the objectors conceded an average of 188 to 191 \* valid signatures. (Complaint, Exhibits E and F.) In other words, the petition of the Progressive Party was short by a total of not over 110 and perhaps only 83 signatures distributed over 9 counties. The petition contained many thousands of valid signatures in excess of the basic requirement of 25,000. But these extra signatures, since they did not come from the counties where they were needed, could not be used to make up that tiny deficit of between 83 and 110 signatures.

Thus, as the 1935 amendment is operating in this case, it predicates the influence of a voter's signature on his geographical residence. The democratic maxim "One Man, One Vote" does not apply under Section 2 of Article 10 to forming a new party or nominating candidates by petition. The vote (here the signature) of a voter counts only if he comes from the right county.

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\* Depending on how certain errors noted and corrections made at the proceeding are calculated.

It is important to note that no similar geographical requirement is to be found in any of the other provisions of The Illinois Election Code.

Once a new party succeeds by petition in getting on the ballot, it needs only 5 per cent of the total vote cast throughout the state in order to become a legally established political party. That 5 per cent of the vote can come from all 102 counties or from only one county, **and every vote counts equally with every other vote, regardless of where it comes from.** (*Section 2, Article 10, Illinois Election Code.*)

Candidates for state-wide office are elected by popular vote on a state-wide basis, and in determining the results of an election for state-wide office, **every vote counts equally with every other vote, regardless of where it comes from.**

Established political parties, in nominating their candidates at primary elections, are faced with no geographical requirement as to the distribution of primary votes by county. Republican or Democratic candidates for state-wide offices are nominated at primary elections by the votes of all the Republican or Democratic voters throughout the state, **and every vote counts equally with every other vote, regardless of where it comes from.** (*Article 7, Illinois Election Code.*)

Voters in any particular Congressional district, county, Senatorial district, city, township, or other political district for which officers or representatives are elected may form a new party in such political district and nominate candidates by petition under Article 10 of the Illinois Election Code without meeting any distribution requirement as to the signatures on their petitions. They must obtain a minimum number of valid signatures equal to 5 per cent of the vote cast in the last general election in the political district in question, **but those signatures can come from all**

parts of the district or from one corner of it. And this is as things should be, since any candidate so nominated can be elected by a majority (or upon occasion, by a plurality) of the voters of his district, with every vote counting equally with every other vote, regardless of where in the district it comes from. (*Section 2, Article 10, Illinois Election Code.*)

And although it is unlikely to occur, it is entirely possible that the voters of Cook County, since they outnumber the voters of all the rest of the state put together, could elect a United States Senator and other state-wide officers in the face of the united opposition of the voters of the other 101 counties. So long as there is one state of Illinois which includes Cook County along with the other counties of the state, this would be a perfectly proper result.

**Although the majority could elect, it could not nominate! This is the anomalous result of the 1935 amendment.**

It is apparent that the legislature, by the 1935 amendment, discriminated against voters who might wish to form a new political party and to nominate candidates for presidential electors, United States Senator, and state offices by petition under Article 10 of the Illinois Election Code. For the legislature imposed on those voters a rigid and arbitrary geographical requirement which bears no relation to any other provision of the Illinois Election Code and which could only have the result of making it extraordinarily difficult to form a new party and place a new party, or independent candidates on the ballot.

Given the facts of population distribution in Illinois, it is clear that the obstacles imposed by the 1935 amendment achieve their effect by making it impossible for the voters of the more populous counties of the state (despite the fact that they comprise an overwhelming majority of the qualified voters of the state) to form a new party or to

nominate independent candidates by themselves. In other words, the legislature, by the 1935 amendment, imposed a kind of second-class citizenship on millions of voters in the state solely because of their place of residence. That second-class citizenship applies only to their right as voters to form new parties and to nominate new-party or independent candidates by petition. Their rights as voters to nominate candidates of the established parties are not similarly restricted.

Thus the discrimination inherent in the 1935 amendment is manifold in its effect. First of all, it discriminates against the voters of the more populous counties of the state and in favor of the voters of the less populous counties. Furthermore, it discriminates against voters who may wish to form a new party and to nominate new-party or independent candidates by petition by imposing an extremely difficult requirement as to geographical distribution, and in favor of voters in the established political parties as to whom no such geographical distribution of the vote is required.

The great growth in the population of Chicago and Cook County in recent decades has resulted in a maldistribution of political power in the state. A notable consequence of that maldistribution was the long fight over Congressional reapportionment in Illinois, a fight in which the case of *Colegrove v. Green*, *supra*, played a significant part. Although this situation has subsequently largely been remedied, there is still great inequity in the arrangement of legislative districts and Illinois Supreme Court districts in Illinois.

Legislative districts for the Illinois General Assembly have not been redistricted since 1901. Thus Cook County, with more than half the population of the state, has only

nineteen state Senators out of fifty-one, and only fifty-seven Representatives out of a total of one hundred and fifty-three. The Illinois Supreme Court districts have not been redistricted since the adoption of the 1870 Illinois Constitution. The result is that six of the seven judges are elected from down-state districts, containing altogether only about 40 per cent of the state's population. The remaining judge is elected in a district composed of Cook County and four other counties now containing about 60 per cent of the population. These facts were brought to the attention of this Court in *Colegrove v. Green*.

The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code requiring for a valid nominating petition at least 200 signatures from each of at least 50 counties fits into this pattern of down-state control. The provision makes it impossible for the voters of Cook County to form a new party or nominate independent candidates. It makes it equally impossible for the voters of the predominantly urban areas of the state to form a new party or nominate independent candidates. For the voters of the smallest and primarily rural counties exercise an absolute veto.

In the face of these facts as to population distribution, and it should be noted that in no other state in the union is there such a marked disparity between the population of the largest county and that of the other counties of the state, and in the face of these political realities, the 1935 amendment is seen to be a most arbitrary and discriminatory enactment. For the reasons hereinafter stated, we submit that it violates provisions of the Constitutions of the United States and the State of Illinois.

## III.

**The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates the equal protection of the laws clause of Amendment XIV to the United States Constitution.**

Amendment XIV to the United States Constitution provides:

“ . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”

The equal protection clause is fully applicable to cases of discrimination against the exercise of political rights. *McPherson v. Blacker*, 146 U. S. 1, 23-24. (1892); *Nixon v. Herndon*, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); *Snowden v. Hughes*, 321 U. S. 1, 11 (1944).

The two “white primary” cases of *Nixon v. Herndon* and *Nixon v. Condon*, *supra*, stand for the proposition that discrimination against a group of citizens in their right to vote in a primary election constitutes denial of equal protection of the laws.

The discrimination resulting from the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code, while not relating to the right to participate in a party primary, relates to the right to participate in an alternative method of nomination, which, like a primary, under the Illinois Election Code is an integral part of the entire election process.

Under the Illinois Election Code, *Ill. Rev. Stat., 1947, Chap. 46*, there are only three methods by which candidates for public office may be nominated: (1) by primary elections under Articles 7 and 8; (2) by convention under Articles 9 and 21; and (3) by nominating petition under Article

10. Established political parties as defined in the Illinois Election Code nominate their candidates for judicial offices and for presidential electors by the convention method under Articles 9 and 21 respectively. They nominate their candidates for other posts, federal, state, and local, by means of party primary elections under Articles 7 and 8.

Article 10 of the Illinois Election Code is the only set of provisions establishing machinery for the nomination of candidates by voters who are not members of established political parties. It permits the forming of new parties and the nomination of independent candidates by nominating petitions. For state-wide office, including United States Senator and Electors of President and Vice-President of the United States, the requirement both for new-party and independent nominations contained in Section 10 of the Illinois Election Code is 25,000 signatures of qualified voters, including at least 200 signatures from each of at least 50 counties. Apart from Article 10, there is no other possibility of nominating candidates open to independent voters or to voters who do not wish to participate in any of the legally established political parties.

Thus in Illinois the procedure of nominating by petition under Article 10 is every bit as much an integral part of the whole elective system as are the primary provisions set out in Articles 7 and 8.

The *Herndon* and *Condon* cases struck down state legislation which discriminated against citizens in the exercise of a political right on the grounds of race. The discrimination under the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code is equally unconstitutional. It violates the equal protection clause of Amendment XIV in the following respects:

1. There is gross discrimination, on the basis of residence, against the vast majority of the citizens of

the State of Illinois, particularly those residing in populous areas. In particular there is discrimination against the citizens of Cook County, who comprise over half the total population of the state. Their voting strength, insofar as the nomination of candidates by petition under Article 10 is concerned, is hampered and even nullified by the absolute veto exercised by the 13 per cent of the registered voters of the state who reside in the 53 least populous counties of the state. The majority can elect but it cannot nominate!

2. There is gross discrimination against those independent voters who wish to avail themselves of their right to nominate candidates under Article 10 of the Illinois Election Code rather than to participate in the nominating processes at primary elections of the regularly established political parties. The vote of one who votes in a regular party primary counts equally with every other vote cast regardless of the voter's place of residence. But the effectiveness of the signature of an independent or new-party voter on a nominating petition under Article 10 of the Illinois Election Code is dependent on the geographical distribution of the signatures obtained.

3. There is gross discrimination against adherents of a new party and in favor of adherents of an already established party, inasmuch as the latter are guaranteed their place on the ballot, under Section 2 of Article 7 of the Illinois Election Code, if their vote at the preceding general election equaled five (5) per cent of the total vote cast, without regard to the geographical distribution of that vote. The new party adherents, on the other hand, can secure their right to a place on the ballot only by meeting the exacting geographical requirements imposed by the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code.

The discrimination against new-party and independent candidacies effected by the 1935 amendment is purposeful, not accidental. As has already been pointed out, the 1935 amendment fits into the pattern of political control in the State of Illinois, a pattern which reveals a marked maldistribution of representation and voting power. The obvious

purpose and effect of the 1935 amendment is to deprive the voters of the most populous counties of the state of their right to independent political action and thereby to preserve the monopoly of the ballot held by the established political parties. The Appellants contend that they are being denied equal protection of the laws, just as the plaintiffs did in *Colegrove v. Green*, *supra*. And in this connection the following language of Mr. Justice Black, dissenting in that case (at page 569), is in point:

"It is difficult for me to see why the 1901 State Apportionment Act does not deny appellants equal protection of the laws. . . . And such a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment. The 1901 State Apportionment Act if applied to the next election would thus result in a wholly indefensible discrimination against appellants and all other voters in heavily populated districts. The equal protection clause of the Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. See *Nixon v. Herndon*, 273 U. S. 536, 541; *Nixon v. Condon*, 286 U. S. 73. No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit."

## IV.

The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates the due process clause of Amendment XIV to the United States Constitution.

The Supreme Court of Illinois has said, in *Gillespie v. The People*, 188 Ill. 176, 182-83 (1900):

"The terms, 'life', 'liberty' and 'property', are representative terms, and intended to cover every right, to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away except by due process of law."

And Cooley, in his *Principles of Constitutional Law* (1880), in Chapter XIII entitled "Civil Rights and Their Guarantees" under Section IV entitled "The Guarantees of Life, Liberty, and Equality", has the following to say with regard to suffrage (at page 237):

"*Suffrage*.—Participation in the suffrage is not of right, but it is granted by the State on a consideration of what is most for the interest of the State. Nevertheless, the grant makes it a legal right until it is recalled, and it is protected by the law as property is. . . ."

For the deprivation of the right to vote a person is entitled to damages. See *Wiley v. Sinkler*, 179 U. S. 58 (1900); *Swafford v. Templeton*, 185 U. S. 487 (1902); *Lane v. Wilson*, 307 U. S. 268 (1939).

But regardless of whether the right of suffrage is considered as an attribute of "liberty" or of "property", it

cannot be taken from a person without due process of law. Due process imports a standard of reasonableness. In any classification adopted by a legislature, the classes and categories must bear a reasonable relationship to the legitimate objectives of the legislature, and the classifications adopted must themselves be reasonable. For the many reasons set out in detail above, the Appellants submit that the 1935 amendment to Section 2 of Article 10 of the Illinois Election Code is manifestly arbitrary and unreasonable.

## V.

**The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates Amendment XVII to the United States Constitution.**

Amendment XVII provides for the popular election of United States Senators. To be sure, the qualifications for electors are determined by the individual states. But the clear and plain meaning of the amendment in requiring that Senators shall be "elected by the people" of each state is that they shall be elected by popular vote, that is, by a majority (or plurality) of the voters participating.

The nomination of candidates for the office of United States Senator must be in accordance with the same standards. This would certainly seem to be the plain requirement of *United States v. Classic*, 313 U. S. 299 (1941), where the nominating process is an integral part of the election procedure.

Under the Illinois Election Code, nomination by primary is by popular vote, with the candidate receiving the highest number of votes winning the nomination. There is no requirement as to geographical distribution of those votes. Yet with regard to the nomination of new-party candidates

or independent candidates for United States Senator under Article 10 of the Illinois Election Code there is a geographical distribution requirement; no one can be nominated by this process unless he receives, included in the minimum of 25,000 valid signatures, at least 200 signatures from each of at least 50 counties. He might secure 1,000,000 signatures on his nominating petition, but unless he had at least 200 from each of at least 50 counties, he would not be nominated. On the other hand a candidate with as few as 25,000 signatures, properly distributed, would be nominated.

This is a clear violation of the requirement of Amendment XVII that Senators be elected by the people of the State. For as has already been emphasized, a majority of the registered voters of the State of Illinois residing in Cook County, and even the 87 per cent residing in the 49 most populous counties, cannot nominate a candidate for any state-wide office, including United States Senator, under Article 10 of the Illinois Election Code.

Let us assume that the Primary Law (*Article 7 of the Illinois Election Code*) were amended to provide that in the party primaries of the legally established political parties the candidate for any state-wide office, including United States Senator, who received the largest vote in the primary would be nominated, provided that he received at least 1,000 votes from each of 50 counties; and in the event that the candidate with the largest vote did not receive at least 1,000 votes from each of 50 counties, then the candidate with the next largest vote who did receive the required vote in each of 50 counties would be deemed nominated. Can there be any question that such a requirement would be unconstitutional under Amendment XVII? Certainly *United States v. Classic*, *supra*, and *Smith v.*

*Allwright*, 321 U. S. 649 (1944), would seem to permit other conclusion.

There should then be no doubt about the unconstitutionality under Amendment XVII of the 1935 amendment Section 2 of Article 10 of the Illinois Election Code, since nomination by petition under Article 10 is just as much an integral part of the Illinois election machinery as nomination by primary under Article 7.

Since the 1935 amendment is unconstitutional insofar as it relates to nominations for the office of United States Senator (for which office the Progressive Party sought to nominate a candidate), and since the 1935 amendment contains no separability clause, the amendment must fall with regard to nominations for other political offices as well. *Myers v. Anderson*, 238 U. S. 368 (1915).

## VI.

The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates the privileges and immunities clause of Amendment XIV to the United States Constitution.

1. The right to vote for federal officers is a right protected by the United States Constitution.

The well-known and often-cited case of *Ex parte Yarbrough*, 110 U. S. 651 (1884), involved a petition for habeas corpus by certain persons convicted of a conspiracy to intimidate a Negro from voting for a member of Congress. The question arose as to the right of Congress to enact the legislation under which the indictments were made. Mr. Justice Miller, speaking for a unanimous Court, wrote at pages 662-64:

"This proposition answers also another objection to the constitutionality of the laws under consideration.

namely, that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively. \* \* \*

"Put it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

"The office, if it be properly called an office, is created by that Constitution and by that alone. \* \* \*

"The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

"It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State."

This view has been followed consistently by this Court in a long line of cases. Thus in *Wiley v. Sinkler*, 179 U. S. 58 (1900), the Court said, at page 62:

"The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."

See further *United States v. Masley*, 238 U. S. 383, 386 (1915); *Swafford v. Templeton*, 185 U. S. 487, 492-93 (1902); *United States v. Classic*, 313 U. S. 299, 314-15 (1941).

There is no question that the right to vote for United States Senators is protected along with the right to vote for members of the House of Representatives. Section 4

of Article I concerns Senators as well as Representatives, and Amendment XVII provides for the popular election of Senators. See *Chapman v. King*, 154 F. 2d 460 (C. C. A. 5th 1946), cert. den. 327 U. S. 800 (1946); *Smith v. Allwright*, 321 U. S. 649 (1944).

**2. The right to nominate candidates for federal office, whether by primary or by petition, is a right protected by the United States Constitution.**

The Illinois Supreme Court has recognized explicitly the role of the process of nomination in the whole elective process. In *People v. Election Commissioners*, 221 Ill. 9, 18 (1906), that Court stated unequivocally:

“• • • The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature.”

It is well settled that where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. This was the holding in *United States v. Classic*, 313 U. S. 299 (1941). At page 314 of the opinion Mr. Justice Stone wrote:

“The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.”

And at page 318 he said:

“The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. **Where the state law has made the primary an integral part of the procedure of choice**, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I,

§ 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative: "• • •"

(Emphasis added.)

In *Smith v. Allwright*, 321 U. S. 649 (1944), Mr. Justice Reed wrote at pages 661-62:

"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."

Here Mr. Justice Reed was referring to the type of primary which was found in the *Classic* case to prevail in Louisiana, namely, a primary election which is part of "a single instrumentality for choice of officers", the result being that the electoral process, composed of primary election and general election, has a "unitary character." The Court found that the same situation prevailed in Texas (at page 664):

"When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."

For the most recent holding on this point, see *Rice v. Elmore*, 165 F. 2d 387 (C. C. A. 4th 1947), cert. den. 68 S. Ct. 905 (1948).

Now, as we have shown above, it is clear from an examination of the Illinois Election Code that nomination by petition under Article 10 is an integral part of the election machinery. For those voters who consider themselves independent and do not wish to declare their party affilia-

tion by voting in a primary or who wish to endeavor to form a new political party, Article 10 is the only way they can nominate candidates and so participate in selecting the candidates who will appear on the general election ballot. See *United States v. Classic*, 313 U. S. 299, 312-13 (1941).

We submit that in Illinois the right to participate in an election for federal offices includes the right to nominate candidates for those offices by petition under Article 10 of the Illinois Election Code. That procedure is as integral a part of the election machinery as is the party primary. The right to nominate by petition is therefore a right secured by the United States Constitution.

**3. The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates the privileges and immunities clause of Amendment XIV to the United States Constitution.**

Amendment XIV provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. \* \* \*

In *Twining v. New Jersey*, 211 U. S. 78, 97 (1908), this Court said:

"Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, *Crandall v. Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States v. Cruikshank*, *supra*; the right to vote for National officers, *Ex parte Yarbrough*, 110 U. S. 651; *Wiley v. Sinkler*, 179 U. S. 58. \* \* \*

And see *Snowden v. Hughes*, 321 U. S. 1, 67 (1944); *Hague v. C. I. O.*, 307 U. S. 496, 512-513 (1939); *Edwards v. California*, 314 U. S. 160, 178 (1941).

Appellants therefore submit that their privilege as United States citizens to participate in the choice of candi-

dates and to vote for candidates for federal offices has been abridged by the State of Illinois. The details of the abridgement have already been presented, but essentially it amounts to this: **qualified voters have been deprived of the opportunity to nominate candidates by petition, for unless there is the geographical distribution required by the statute, even an absolute majority of the voters of the state cannot nominate by petition under Article 10 of the Illinois Election Code.**

For the reasons given, the 1935 amendment is unconstitutional insofar as it relates to the nomination of candidates for United States Senator. As stated in Point V above, therefore, it must fall as to all other offices as well.

## VII.

**The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code violates Section 18 of Article II of the Illinois Constitution which provides that "All elections shall be free and equal."**

It has already been shown that the 1935 amendment prevents the 87 per cent of the states' registered voters who reside in the 49 most populous counties from forming a new political party in the state and from nominating new-party or independent candidates for state office under Article 10 of the Illinois Election Code, while 25,000 of the remaining 13 per cent of the registered voters properly distributed among the 53 least populous counties could do so. That this provision of Section 2 of Article 10 of the Illinois Election Law is in violation of Section 18 of Article II of the Illinois Constitution is clear from the decisions of the Illinois Supreme Court.

In *People v. Election Commissioners*, 221 Ill. 9 (1906), the Illinois Supreme Court stated, at page 18, in language already quoted above:

“ . . . The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen and is of precisely the same nature.”

In that case the Illinois Court held the Primary Act of 1905 in violation of Section 18 of Article II of the Illinois Constitution, saying at page 16:

“To protect and preserve that sovereignty the people registered their will that its exercise shall be absolutely free and **that the vote of very qualified elector shall be equal in its influence with that of every other one**, by Section 18 of the Bill of Rights, providing that all elections shall be free and equal.” (Emphasis added.)

In *The People v. For*, 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

“Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one.” \* \* \* [Citing cases.] It is well settled in this state that the term ‘election’ applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature.”

In *McAlpine v. Dimock*, 326 Ill. 240 (1927), the Illinois Supreme Court once more held a Primary Act in violation of Section 18 of Article II of the Illinois Constitution—this time the Primary Act of 1910. The vice in the act was the

disproportionate voting power of precinct committeemen at county conventions.

As a result of the foregoing decisions, a new Primary Act was passed in 1927. This Act was upheld in *People v. Kramer*, 328 Ill. 512, 525 (1928), the court finding that the legislature had cured the defects in disproportionate voting power which made the earlier act unconstitutional in *McAlpine v. Dimock*.

The only possible conclusion from this series of cases is that the "free and equal" clause of the Illinois Constitution requires that each voter have approximately the same right to nominate candidates for office as every other voter. That this right is grossly violated by the 1935 Amendment to Section 2 of Article 10 of the Illinois Election Code is clear: the Amendment would permit 25,000 of the 13 per cent of the registered voters in Illinois to create a new political party and nominate new-party or independent candidates while denying that right to 87 per cent of the state's registered voters who reside in the 49 most populous counties of the State.

For a decision from another jurisdiction holding unconstitutional a comparable requirement as to nomination by petition, see *State ex rel. Ragen v. Junkin*, 85 Neb. 1, 122 N. W. 473 (1909).

## VIII.

Even if the constitutionality of the 1935 amendment to section 2 of Article 10 should be upheld, Section 4 of Article 10 of the Illinois Election Code should not be construed so as to bar the Progressive Party candidates for President and Vice-President of the United States from the ballots for the election to be held on November 2, 1948.

Section 4 of Article 10 of the Election Code provides:

"Any person who has already voted at a primary election, held to nominate a candidate or candidates for any office or offices, to be voted upon at any certain election, shall not be qualified to sign a petition of nomination for a candidate or candidates for the same office or offices, to be voted upon at the same certain election."

The signers of a nominating petition for a certain office are not, therefore, disqualified by reason of their participation in the primary if the office specified in the petition is not one for which nominations were made at the primary.

Actually at the preceding primary election held on April 13, 1948, no candidates for the offices of Electors of President and Vice-President of the United States appeared on the ballot of either the Democratic or Republican parties. Nor was that primary election in any sense a primary election to nominate candidates for Electors of President and Vice-President of the United States, or for President and Vice-President of the United States, since all of such candidates are chosen by convention.

None of the signers of the Progressive Party nominating petition did vote or could have voted in the primary election for candidates for presidential electors. They were there-

fore not disqualified from signing a nominating petition for candidates for these offices, since these were not the same offices for which the primary was held, but different offices.

It follows that although the State Officers Electoral Board rightfully could have found that the signers of the nominating petition who had voted in the preceding primary election were thereby disqualified from signing a petition for offices voted on at that primary, i. e., United States Senator, Governor, and other state offices, the Board could not properly have held under Section 4 of Article 10 that voters who voted in the preceding primary election were disqualified from signing a nominating petition for offices not voted upon at that primary election, i. e., Electors of President and Vice-President of the United States.

This construction of the plain provisions of Section 4 of Article 10 is confirmed by Section 43 of Article 7 which disqualifies certain persons from voting in the primaries. That section reads as follows:

"No person shall be entitled to vote at a primary . . .

(b) who shall have signed a petition for nomination of a candidate of any party with which he does not affiliate, **when such candidate is to be voted for at the primary;**

(c) who shall have signed the nominating papers of an independent candidate for any office **for which office candidates for nomination are to be voted for at such primary.** (Emphasis added.)

Taken with Section 4 of Article 10 this section establishes a statutory scheme by which a voter may both vote in the primary of an established political party and sign nominating petitions for candidates of another party for offices which are not voted for at that primary. If the voter should sign a nominating petition for the candidate of another party or for an independent candidate for an

office not be voted upon at the primary, ~~before the primary~~, this section permits him to vote at the primary of his party for other offices. If the voter should already have voted in a party primary, he may, under Section 4 of Article 10, **subsequent to the primary**, sign a nominating petition for a candidate of another party or for an independent candidate, so long as it is a candidate for an office not voted for at that primary.

This is the clear meaning of the statute.

The complaint alleges (par. 48) that had the signatures of signers who voted in the preceding primary election been counted, there would have been more than 200 signatures from each of 50 counties.

Since signatures of voters who voted in the preceding primary election are valid with respect to the nomination of candidates for the offices of Electors of President and Vice-President of the United States, their signatures should have been counted and the petition held valid as to these offices. The ruling of the State Officers Electoral Board to the contrary was therefore improper.

It is apparent, therefore, that the Progressive Party petition contained a sufficient number of valid signatures to satisfy even the exacting requirements of the 1935 Amendment for the nomination of presidential electors. We submit, irrespective of the disposition of the constitutional issues, that this Court should direct that the candidates of the Progressive Party for President and Vice-President be placed on the ballot.

## IX.

Appellants waived none of their constitutional rights by not asserting them before the State Officers Electoral Board.

The State Officers Electoral Board is not a judicial or quasi-judicial body. It has extremely limited functions, which are specified in Section 10 of Article 10 of the Illinois Election Code. Essentially its job is one of fact-finding. It clearly does not have power to consider or pass upon the constitutional questions raised in the district court and now before this Court.\* Under Illinois law it is well established that constitutional rights not raised before such a body are not waived. *Welton v. Hamilton*, 344 Ill. 84 (1931).

Moreover, three of the Appellants here were not parties to the proceedings before the State Officers Electoral Board. Appellants Garfield and Andich, who signed the Progressive Party nominating petition, and Appellant Holtzman, who did not sign because he was not of voting age until September 24, 1948. They are before the Court to protect their constitutional rights as citizens and qualified voters and are not bound by any of the proceedings before the State Officers Electoral Board.

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\*The Appellees County Clerk of Cook County, City Clerk of the City of Chicago, and Board of Election Commissioners of the City of Chicago in their Brief in the district court admitted as much: "The decision of the Electoral Board was not rendered on any constitutional issue or question. Obviously it had no authority so to do, even if such issues had been presented to it. The Board could only read and apply the appropriate provisions of the Election Code, and this it did."

**This Court can enter an effective order granting the relief requested by appellants.**

If this Court declares the 1935 Amendment to Section 2 of Article 10 of the Illinois Election Code unconstitutional, the legislation in its original form would remain intact. The invalidation of the amendment would not nullify the whole statute. *People v. Alterie*, 356 Ill. 307 (1934). It is conceded that the Progressive Party petition complies fully with all the requirements of Section 2 of Article 10, as in force prior to the 1935 amendment.

The substance of the relief here requested is an order requiring the various Illinois election officials to place the Progressive Party candidates on the official ballots for use throughout the State of Illinois at the November 2, 1948 general election. Although this case comes to this Court only two weeks before the election, Appellants brought it here at the earliest possible moment. The Progressive Party nominating petition was filed during the one week period authorized for filing, 78 to 85 days prior to election. (*Section 6 of Article 10, Illinois Election Code.*) As their Jurisdictional Statement shows, Appellants throughout have been diligent in seeking a remedy. At this date the relief sought is still practicable.

A prompt decision here will afford the election officials time to print new ballots or to re-run the ballots previously printed so as to imprint upon them the names of Progressive Party candidates. In the alternative, there is available the method of affixing pasters to the ballots, a method specifically authorized by Section 13 of Article 10 of the Illinois Election Code in the event of vacancies in nominations.

In Cook County a re-run would be relatively simple in view of the fact that there is already a Progressive Party column on the ballots for the Progressive Party county and city candidates, with a blank space in place of the names of Presidential, Vice-Presidential, Senatorial, and state candidates. (*See the photostatic copy of a Cook County ballot appended as Exhibit I.*) In any event a paster could easily be prepared which would fit this blank space. (*See the sample paster appended as Exhibit II.*) In the other counties, a paster could be prepared and affixed to the right-hand edge of the regular ballots, thus adding an extra column with the names of Progressive Party candidates thereon. (*See the photostatic copy of a Peoria ballot appended as Exhibit III.*)

In some areas, and in approximately one out of every ten Cook County precincts, voting machines will be used. Adding the names of candidates to the machines is a simple matter.

Thus the difficult practical and political questions which gave concern to the majority of the Court in *Colegrove v. Green*, 328 U. S. 549 (1946), are not present here.

In that case a majority of the members then sitting held that the Court had jurisdiction to grant the relief requested. Mr. Justice Rutledge, however, felt that the Court should decline to exercise its jurisdiction for the reason, in his words (at page 566), that "the cure sought may be worse than the disease." When Mr. Justice Frankfurter, at page 552, wrote that the relief requested was beyond the competence of the Court to grant, he had in mind more than technical questions of jurisdiction. Indeed he said, "This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'." By emphasizing the fact that no court could affirmatively remap the Illinois congressional districts, he appears to have been

concerned with the practical problems of government and the relationships of its various branches. He also feared that judicial action, by causing all Congressional elections in Illinois to be held at large, might produce consequences even worse than those arising from unequal districts. And this, it is significant, was the possibility which worried Mr. Justice Rutledge.

Since none of these delicate problems are involved here, the *Colegrove* case stands as an authority for the assumption of jurisdiction and the granting of relief in these proceedings. Cf. *Rice v. Elmore*, 165 F. 2d 387 (C. C. A. 4th 1947), cert. den. 68 S. Ct. 905 (1948).

### Conclusion.

For all of the reasons argued above, the Appellants respectfully submit that the order of the District Court denying an interlocutory injunction and dismissing the complaint should be reversed, and the cause remanded with directions to reinstate the complaint and issue an interlocutory injunction as prayed for in the complaint.

Respectfully submitted,

JOHN J. ABT,  
H. B. RITMAN,  
EARL B. DICKERSON,  
RICHARD F. WATT,  
EDMUND HATFIELD,  
MILTON T. RAYNOR,  
BERNARD WEISSBOURD,  
188 West Randolph St.,  
Chicago, Illinois,  
*Attorneys for Plaintiffs-Appellants.*

MALCOLM P. SHARP,  
The Law School,  
University of Chicago,  
*Of Counsel.*

## APPENDIX A.

### DISTRICT COURT OF THE UNITED STATES, For the Northern District of Illinois, Eastern Division.

<p>Curtis D. MacDougall, et al.,  <i>Plaintiffs,</i>  <i>vs.</i>          Dwight H. Green, Individually and as          Governor of the State of Illinois, <i>et al.,</i>  <i>Defendants.</i></p>	}	No. 48 C 1406
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### Findings of Fact and Conclusions of Law.

This cause coming on to be heard on the Plaintiffs' verified complaint as amended and motion for an interlocutory injunction and the Court, having heard argument of counsel and having considered the briefs of the parties and of *amicus curiae* and being fully advised in the premises, does make and adopt the following findings of fact and conclusions of law:

#### Findings of Fact.

1. This is an action of a civil nature brought under §2201 of the Declaratory Judgment Act, 28, c. 151, United States Code, effective September 1, 1948.

2. The individual defendants are citizens and residents of the State of Illinois; they claim to be candidates of a new political party known as "The Progressive Party" for United States Senator from the State of Illinois and

for certain public offices of the State of Illinois; they seek the entry of an interlocutory injunction that the defendants Dwight H. Green, Arthur C. Lueder and Edward J. Barrett, Governor, Auditor of Public Accounts, and Secretary of the State of Illinois, respectively, be directed to certify to the respective county clerks of the State of Illinois, as the candidates of the Progressive Party, the names of the persons named in the complaint.

3. That on August 16, 1948 a declaration of intention to form a new State-wide political party and a petition to nominate candidates for that party was filed by and on behalf of The Progressive Party pursuant to the provisions of Article 10 of the Illinois Election Code; said nominating petition, together with the statements of candidacy of the individual candidates, was presented to the Governor, the Auditor of Public Accounts, and the Secretary of State of the State of Illinois for endorsement and filed in the office of the Secretary of State as required by law; that on August 21, 1948 certain legal voters of the State of Illinois filed objections to said nominating petition and thereafter on August 26, 1948 the State Officers' Electoral Board, the body provided for by law to hear and pass upon objections to nominating petitions filed pursuant to Article 10 of the Illinois Election Code, convened in the Capitol Building in Springfield, Ill. The objectors and the Progressive Party and the members thereof appeared before the Board. No objection was made to the qualifications of the members thereof or that the Electoral Board did not have jurisdiction of the parties, of the proceedings, and of the subject matter.

4. Said Board received evidence and heard arguments on behalf of the parties interested from August 26, 1948 to August 31, 1948, and on August 31 found as a fact "That the nominating petition filed on behalf of the said candi-

dates of The Progressive Party does not include the signatures of 200 qualified voters from each of at least 50 counties within this State as required by statute for the nomination of said candidates for such public office, and is therefore insufficient in law as a nominating petition," and that the purported petition was not sufficient in law to entitle the said candidates' names to appear on the ballot for use at November 2, 1948 general election.

### Conclusions of Law.

1. The provisions of § 2 of Article 10 (10-2, c. 46, Ill. Rev. Stat. 1947), requiring for a valid nominating petition at least two hundred signatures of qualified voters from each of at least fifty counties is not repugnant to, nor in violation of any provision of the Constitution of the United States, nor does it contravene § 18 Article II of the Constitution of Illinois.

2. This court is without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board of August 31, 1948 and to hold that the Board's decision is null and void.

3. The motion for the interlocutory injunction will be denied.

(Signed) OTTO KERNER,  
*Judge U. S. Court of Appeal.*

(Signed) PHILIP L. SULLIVAN,  
*Judge U. S. District Court.*

(Signed) M. L. IGOE,  
*Judge U. S. District Court.*

## APPENDIX B.

TABLE I.

DISTRIBUTION OF POPULATION AND REGISTERED VOTERS  
IN STATE OF ILLINOIS.

	Population*	%	Registered Voters #	%
Cook County	4,063,342	51.4	2,557,560	52.6
5 most populous counties	4,663,170	59.0	2,873,056	59.4
10 most populous counties	5,250,796	66.5	3,225,984	66.3
25 most populous counties	6,248,271	76.5	3,822,973	78.6
49 most populous counties	7,079,663	89.6	4,292,565	87.2
41 counties conceded by objectors	6,381,427	80.8	3,880,237	79.6
Totals—State of Illinois (102 counties)	7,895,644	100.0	4,860,362	100.0

\* Population figures from 1940 census.

# Registration figures from best available 1948 estimates.

TABLE II.

## FORTY-NINE MOST POPULOUS COUNTIES IN ILLINOIS.

No.	County	Population	Cumulative Totals	Registered Voters	Cumulative Totals
1	Cook	4,063,342		2,557,560	
2	St. Clair	166,899		60,577	
3	Peoria	153,374		83,023	
4	Madison	149,349		91,893	
5	Kane	130,206		80,000	
			4,663,170		2,873,056
6	Winnebago	121,178		65,830	
7	Lake	121,094		62,896	
8	Sangamon	117,912		80,000	
9	Will	114,210		73,202	
10	Rock Island	113,232		71,000	
			5,250,796		3,225,984
11	DuPage	103,480		69,608	
12	LaSalle	97,801		70,000	
13	Vermillion	86,791		46,896	
14	Macon	84,693		55,000	
15	McLean	73,930		37,148	
16	Champaign	70,578		40,000	
17	Adams	65,229		31,500	

No.	County	Population	Cumulative Totals	Registered Voters	Cumulative Totals
18	Kankakee	60,877		39,000	
19	Tazewell	58,362		34,353	
20	Franklin	53,137		33,817	
21	Knox	52,250		31,300	
22	Williamson	51,427		26,000	
23	Marion	47,989		20,000	
24	Macoupin	46,304		30,367	
25	Fulton	44,627		27,000	
			6,248,271		3,822,973
26	Henry	43,798		27,000	
27	Whiteside	43,338		23,500	
28	Stephenson	40,646		20,000	
29	Livingston	38,838		21,300	
30	Christian	38,564		20,500	
31	Colas	38,470		22,100	
32	Saline	38,066		19,000	
33	Jackson	37,920		19,000	
34	Bureau	37,600		24,000	
35	McHenry	37,311		24,556	
36	Morgan	36,378		20,581	
37	Lee	34,604		18,067	
38	Montgomery	34,499		24,000	
39	DeKalb	34,388		22,239	
40	Jefferson	34,375		20,996	
41	Randolph	33,608		17,781	
42	Iroquois	32,496		19,000	
43	Ogle	29,869		18,000	
44	Logan	29,438		17,870	
45	Hancock	29,297		16,500	
46	Fayette	29,159		15,065	
47	McDonough	26,944		13,500	
48	Shelby	26,290		17,037	
49	Alexander	25,496		13,000	
			7,079,663		4,292,565

TABLE III.

COUNTIES IN WHICH AT LEAST 200 QUALIFIED VOTERS SIGNED  
PETITIONS, AS CONCEDED BY OBJECTORS.

County	Approximate Number of Signatures Conceded	Population	Registered Voters
*Alexander	(298)	25,496	13,000
Boone	(226)	15,202	9,786
*Champaign	(400)	70,578	40,000
Clinton	(203)	22,912	12,143
*Coles	(245)	38,470	22,100
*Cook	(27,010)	4,063,342	2,557,560
*DuPage	(320)	103,480	69,608
Edgar	(222)	24,430	14,780
*Franklin	(226)	53,137	33,817
Grundy	(275)	18,398	11,000
*Henry	(263)	43,798	27,000
*Jackson	(294)	37,920	19,000
*Jefferson	(315)	34,375	20,996
*Kane	(422)	130,206	80,000
*Knox	(202)	52,250	31,300
*Lake	(588)	121,094	62,896
Lawrence	(252)	21,075	9,976
*Macon	(414)	84,693	55,000
*Macoupin	(314)	46,304	30,367
*Madison	(446)	149,349	91,896
*Marion	(458)	47,989	20,000
*McHenry	(248)	37,311	24,556
Monroe	(211)	12,754	6,248
*Montgomery	(282)	34,499	24,000
*Peoria	(649)	153,374	83,023
Pulaski	(251)	15,875	8,200
*Randolph	(345)	33,608	17,781
Richland	(271)	17,137	9,749
*Sangamon	(384)	117,912	80,000
*St. Clair	(381)	166,899	60,577
*Stephenson	(350)	40,646	26,000
*Tazewell	(216)	58,362	34,353
*Vermilion	(201)	86,791	46,896
Wabash	(206)	13,724	9,073
Wayne	(229)	22,092	12,349
Washington	(217)	15,801	10,175
White	(208)	20,027	12,500
*Will	(243)	114,210	73,202
*Whiteside	(288)	43,338	23,500
*Winnebago	(236)	121,178	65,830
*Williamson	(287)	51,427	26,000
	(39,105)	6,381,427	3,880,237

\*Indicates county is among forty-nine most populous counties  
of State of Illinois.

# OFFICIAL CANDIDATE BALLOT

☐ DEMOCRATIC

☐ FOR PRESIDENT  
OF THE UNITED STATES  
HARRY S. TRUMAN

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
ALDEN W. BARKLEY

☐ FOR UNITED STATES SENATOR  
PAUL H. DOUGLAS

☐ FOR GOVERNOR  
ADLAI E. STEVENSON

☐ FOR LIEUTENANT GOVERNOR  
SHERWOOD DIXON

☐ FOR SECRETARY OF STATE  
EDWARD J. BARRETT

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
BENJAMIN O. COOPER

☐ FOR STATE TREASURER  
ORA SMITH

☐ FOR ATTORNEY GENERAL  
IVAN A. ELLIOTT

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ FRANCES BEST WATKINS

☐ GEORGE WIRT HERRICK

☐ ROBERT Z. HICKMAN

☐ FOR REPRESENTATIVE  
IN CONGRESS  
1st Congressional District  
WILLIAM L. DAWSON

☐ REPUBLICAN

☐ FOR PRESIDENT  
OF THE UNITED STATES  
THOMAS E. DEWEY

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
EARL WARREN

☐ FOR UNITED STATES SENATOR  
C. WAYLAND BROOKS

☐ FOR GOVERNOR  
DWIGHT H. GREEN

☐ FOR LIEUTENANT GOVERNOR  
RICHARD YATES ROWE

☐ FOR SECRETARY OF STATE  
WILLIAM G. STRATTON

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
SINON A. MURRAY

☐ FOR STATE TREASURER  
ELMER H. DROSTE

☐ FOR ATTORNEY GENERAL  
GEORGE F. BARRETT

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ CHESTER R. DAVIS

☐ CHARLES L. ENGSTROM

☐ DR. W. L. CRAWFORD

☐ FOR REPRESENTATIVE  
IN CONGRESS  
1st Congressional District  
WILLIAM E. KING

☐ PROHIBITION

☐ FOR PRESIDENT  
OF THE UNITED STATES  
CLAUDE A. WATSON

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
DALE H. LEARN

☐ FOR UNITED STATES SENATOR  
ENOCH A. HOLTWICK

☐ FOR GOVERNOR  
WILLIS RAY WILSON

☐ FOR LIEUTENANT GOVERNOR  
R. B. CAMPBELL

☐ FOR SECRETARY OF STATE  
MAUDE SWITS STOWELL

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
IRVING B. GILBERT

☐ FOR STATE TREASURER  
RUPERT J. JORDAN

☐ FOR ATTORNEY GENERAL  
FREDERICK JUCHHOFF

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ E. N. HIMMEL

☐ REGINA ETHEL RUYLE

☐ ROSS E. PRICE

☐ SOCIALIST

☐ FOR PRESIDENT  
OF THE UNITED STATES  
NORMAN THOMAS

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
TUCKER P. SMITH

☐ FOR UNITED STATES SENATOR  
ENOCH A. HOLTWICK

☐ FOR GOVERNOR  
WILLIS RAY WILSON

☐ FOR LIEUTENANT GOVERNOR  
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MAUDE SWITS STOWELL

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
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☐ FOR STATE TREASURER  
RUPERT J. JORDAN

☐ FOR ATTORNEY GENERAL  
FREDERICK JUCHHOFF

☐ FOR TRUSTEES OF  
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(Three to be Elected)

☐ E. N. HIMMEL

☐ REGINA ETHEL RUYLE

☐ ROSS E. PRICE

☐ SOCIALIST

☐ FOR PRESIDENT  
OF THE UNITED STATES  
NORMAN THOMAS

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
TUCKER P. SMITH

☐ FOR UNITED STATES SENATOR  
ENOCH A. HOLTWICK

☐ FOR GOVERNOR  
WILLIS RAY WILSON

☐ FOR LIEUTENANT GOVERNOR  
R. B. CAMPBELL

☐ FOR SECRETARY OF STATE  
MAUDE SWITS STOWELL

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
IRVING B. GILBERT

☐ FOR STATE TREASURER  
RUPERT J. JORDAN

☐ FOR ATTORNEY GENERAL  
FREDERICK JUCHHOFF

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ E. N. HIMMEL

☐ REGINA ETHEL RUYLE

☐ ROSS E. PRICE

☐ PROGRESSIVE

☐ FOR PRESIDENT  
OF THE UNITED STATES  
NORMAN THOMAS

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
TUCKER P. SMITH

☐ FOR UNITED STATES SENATOR  
ENOCH A. HOLTWICK

☐ FOR GOVERNOR  
WILLIS RAY WILSON

☐ FOR LIEUTENANT GOVERNOR  
R. B. CAMPBELL

☐ FOR SECRETARY OF STATE  
MAUDE SWITS STOWELL

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
IRVING B. GILBERT

☐ FOR STATE TREASURER  
RUPERT J. JORDAN

☐ FOR ATTORNEY GENERAL  
FREDERICK JUCHHOFF

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ E. N. HIMMEL

☐ REGINA ETHEL RUYLE

☐ ROSS E. PRICE

☐ FOR REPRESENTATIVE  
IN CONGRESS  
1st Congressional District  
EARL B. DICKERSON

☐ SOCIALIST LABOR

☐ FOR PRESIDENT  
OF THE UNITED STATES  
EDWARD A. TEICHERT

☐ FOR VICE-PRESIDENT  
OF THE UNITED STATES  
STEPHEN EMERY

☐ FOR UNITED STATES SENATOR  
FRANK SCHNUR

☐ FOR GOVERNOR  
LOUIS FISHER

☐ FOR LIEUTENANT GOVERNOR  
O. ALFRED OLSON

☐ FOR SECRETARY OF STATE  
GREGORY LYNKAS

☐ FOR AUDITOR  
OF PUBLIC ACCOUNTS  
NICK MAYS

☐ FOR STATE TREASURER  
RUDOLPH KOSIC

☐ FOR ATTORNEY GENERAL  
EDWARD C. GROSS

☐ FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS  
(Three to be Elected)

☐ LOREN M. JOHNSON

☐ HENRY CORETZ

☐ BERNARD CAMPBELL

☐ INDEPENDENT

59

**EXHIBIT 2.**

Sample paster for Cook  
County ballot.

**FOR PRESIDENT  
OF THE UNITED STATES  
HENRY A. WALLACE**

☐

**FOR VICE-PRESIDENT  
OF THE UNITED STATES  
GLEN H. TAYLOR**

**FOR UNITED STATES SENATOR**

☐

**CURTIS D. MacDOUGALL**

**FOR GOVERNOR**

☐

**GRANT OAKES**

**FOR LIEUTENANT GOVERNOR**

☐

**HARRY L. DIEHL**

**FOR SECRETARY OF STATE**

☐

**PAULINE HIGH REED**

**FOR AUDITOR  
OF PUBLIC ACCOUNTS**

☐

**BERNARD J. McDONOUGH**

**FOR STATE TREASURER**

☐

**FRED J. NEBGEN**

**FOR ATTORNEY GENERAL**

☐

**DONALD L. HESSON**

**FOR TRUSTEES OF  
THE UNIVERSITY OF ILLINOIS**

(Three to be Elected)

☐

**ANITA McCORMICK BLAINE**

☐

**RONALD V. CASSILL**

☐

**WILFRED WAKEFIELD**

# SPECIMEN BALLOT

General (Presidential) Election, Tuesday, November 2, 1948, City of Peoria, County of Peoria, State of Illinois

☐ REPUBLICAN PARTY

☐ DEMOCRATIC PARTY

☐ PROHIBITION PARTY ) PROHIBITION PARTY

☐ SOCIALIST PARTY

☐ SOCIALIST LABOR PARTY

☐ For President of the United States:  
**THOMAS E. DEWEY**  
New York City, New York.

☐ For Vice-President of the United States:  
**EARL WARREN**  
Oakland, California.

☐ For United States Senator:  
**C. WAYLAND BROOKS**  
1637 W. Howard St., Chicago.

☐ For Governor:  
**DWIGHT H. GREEN**  
5349 N. Sheridan Rd., Chicago.

☐ For Lieutenant Governor:  
**RICHARD YATES ROWE**  
Jacksonville.

☐ For Secretary of State:  
**WILLIAM G. STRATTON**  
Moria.

☐ For Auditor of Public Accounts:  
**SINON A. MURRAY**  
3636 N. Central Rd., Chicago.

☐ For State Treasurer:  
**ELMER H. DROSTE**  
Mount Olive.

☐ For Attorney General:  
**GEORGE F. BARRETT**  
1530 N. State Parkway, Chicago.

☐ For Trustees of the University of Illinois:  
(Vote for Three)  
**CHESTER R. DAVIS**  
Wayne.

☐ **CHARLES L. ENGSTROM**  
Peoria.

☐ **DR. W. L. CRAWFORD**  
Rockford.

☐ For Representative in Congress:  
Eighteenth District.  
**HAROLD H. VELDE**  
Pekin.

☐ For Members of the General Assembly:  
Eighteenth District.  
For State Senator:  
**CLYDE C. TRAGER**

☐ For President of the United States:  
**HARRY S. TRUMAN**  
Independence, Missouri.

☐ For Vice-President of the United States:  
**ALBEN W. BARKLEY**  
Paducah, Kentucky.

☐ For United States Senator:  
**PAUL H. DOUGLAS**  
5628 S. Blackstone Ave., Chicago.

☐ For Governor:  
**ADLAI E. STEVENSON**  
Libertyville.

☐ For Lieutenant Governor:  
**SHERWOOD DIXON**  
Dixon.

☐ For Secretary of State:  
**EDWARD J. BARRETT**  
Wilmette.

☐ For Auditor of Public Accounts:  
**BENJAMIN O. COOPER**  
East St. Louis.

☐ For State Treasurer:  
**ORA SMITH**  
Biggsville.

☐ For Attorney General:  
**IVAN A. ELLIOTT**  
Carroll.

☐ For Trustees of the University of Illinois:  
(Vote for Three)  
**FRANCES BEST WATKINS**  
5831 Blackstone Ave., Chicago.

☐ **GEORGE WIRT HERRICK**  
Clinton.

☐ **ROBERT Z. HICKMAN**  
Danville.

☐ For Representative in Congress:  
Eighteenth District.  
**DALE E. SUTTON**  
Pekin.

☐ For Members of the General Assembly:  
Eighteenth District.  
For State Senator:  
**STANLEY W. CRUTCHER**

☐ For President of the United States:  
**CLAUDE A. WATSON**  
Los Angeles, California.

☐ For Vice-President of the United States:  
**DALE H. LEARN**  
East Stroudsburg, Pennsylvania.

☐ For United States Senator:  
**ENOCH A. HOLTWICK**  
Greenville.

☐ For Governor:  
**WILLIS RAY WILSON**  
1851 W. 22nd Pl., Chicago.

☐ For Lieutenant Governor:  
**R. B. CAMPBELL**  
Greenville.

☐ For Secretary of State:  
**MAUDE SWITS STOWELL**  
Rockford.

☐ For Auditor of Public Accounts:  
**IRVING B. GILBERT**  
Moline.

☐ For State Treasurer:  
**RUPERT J. JORDAN**  
Sycamore.

☐ For Attorney General:  
**FREDERICK JUCHHOFF**  
1511 E. 60th St., Chicago.

☐ For Trustees of the University of Illinois:  
(Vote for Three)  
**E. N. HIMMEL**  
Naperville.

☐ **REGINA ETHEL RUYLE**  
Waukegan.

☐ **ROSS E. PRICE**  
Houma.

☐ For President of the United States:  
**CLAUDE A. WATSON**  
Los Angeles, California.

☐ For Vice-President of the United States:  
**DALE H. LEARN**  
East Stroudsburg, Pennsylvania.

☐ For United States Senator:  
**ENOCH A. HOLTWICK**  
Greenville.

☐ For Governor:  
**WILLIS RAY WILSON**  
1851 W. 22nd Pl., Chicago.

☐ For Lieutenant Governor:  
**R. B. CAMPBELL**  
Greenville.

☐ For Secretary of State:  
**MAUDE SWITS STOWELL**  
Rockford.

☐ For Auditor of Public Accounts:  
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Moline.

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☐ **REGINA ETHEL RUYLE**  
Waukegan.

☐ **ROSS E. PRICE**  
Houma.

☐ For President of the United States:  
**NORMAN THOMAS**

☐ For Vice-President of the United States:  
**TUCKER P. SMITH**

☐ For President of the United States:  
**EDWARD A. TEICHERT**  
Greensburg, Pennsylvania.

☐ For Vice-President of the United States:  
**STEPHEN EMERY**  
Jamaica, New York.

☐ For United States Senator:  
**FRANK SCHNUR**  
3805 Ellis Ave., Chicago.

☐ For Governor:  
**LOUIS FISHER**  
3208 1/2 Sunnyside Ave., Chicago.

☐ For Lieutenant Governor:  
**O. ALFRED OLSON**  
Rockford.

☐ For Secretary of State:  
**GREGORY LYNKAS**  
1546 Waveland, Chicago.

☐ For Auditor of Public Accounts:  
**NICK MAYS**  
717 S. Halsted St., Chicago.

☐ For State Treasurer:  
**RUDOLPH KOSIC**  
9534 Avenue J, Chicago.

☐ For Attorney General:  
**EDWARD C. GROSS**  
746 Brompton Pl., Chicago.

☐ For Trustees of the University of Illinois:  
(Vote for Three)  
**LOREN M. JOHNSON**  
Rockford.

☐ **HENRY CORETZ**  
1529 Morse Ave., Chicago.

☐ **BERNARD CAMPBELL**  
900 Montrose Ave., Chicago.

☐ **CHARLES L. ENGSTROM**  
Peoria.

☐ **DR. W. L. CRAWFORD**  
Rockford.

☐ For Representative in Congress:  
Eighteenth District.  
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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, A. D. 1948.**

**No. 348**

**CURTIS D. MacDOUGALL, et al.,**

*Plaintiffs-Appellants,*

**vs.**

**DWIGHT H. GREEN, Individually and as Governor of  
the State of Illinois, et al.,**

*Defendants-Appellees.*

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.**

**BRIEF AND ARGUMENT OF THE APPELLEES,  
MICHAEL J. FLYNN, Individually and as County  
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ELECTION COMMISSIONERS OF THE CITY OF  
CHICAGO AND COMMISSIONERS thereof, Individu-  
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**BRIEF AND ARGUMENT OF THE APPELLEES,  
MICHAEL J. FLYNN, Individually and as County  
Clerk of Cook County, Illinois, and THE BOARD OF  
ELECTION COMMISSIONERS OF THE CITY OF  
CHICAGO AND COMMISSIONERS thereof, Individu-  
ally and as such COMMISSIONERS.**

---

**SUMMARIZED STATEMENT OF THE MATTERS  
INVOLVED.**

On or about August 16, 1948 a nominating petition was filed by and on behalf of The Progressive Party and its candidates, in the office of the Secretary of State of the State of Illinois. Thereafter, and within the statutory period, certain legal voters of the State of Illinois filed objections to said nominating petition as provided for under Article 10 of the Illinois Election Code (ch. 46, Ill.

Rev. Stats., 1947). Subsequently, the Illinois State Officers Electoral Board was duly convened under that Election Code for the statutory purpose of hearing and passing upon the objections to the nominating petitions filed by The Progressive Party. The Board consisted of two Justices of the Supreme Court of Illinois and the Auditor of Public Accounts of the State of Illinois.

At the hearings before the Board the objectors appeared by counsel and the candidates of The Progressive Party appeared by counsel. Witnesses were sworn, evidence received and testimony duly taken. Thereafter, the Board ruled that the nominating petition filed on behalf of The Progressive Party candidates did not include the signatures of 200 qualified voters from each of at least 50 counties within the State as required by statute for the nomination of said candidates, and therefore, the purported petition of The Progressive Party was not sufficient in law to entitle the said candidates' names to appear on the ballot.

Thereafter, The Progressive Party moved for leave to file petitions for mandamus in the Supreme Court of Illinois. Such leave was sought by two motions, both of which were denied.

The Progressive Party subsequently filed the complaint in this case, commencing the action in the District Court of the United States for the Northern District of Illinois under Section 2201 of the Declaratory Judgment Act (Title 28, c. 151 U. S. Code, effective September 1, 1948.)

The allegations contained in the complaint for declaratory judgment and injunctive relief can be crystallized into two propositions:

1. The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code is allegedly unconstitutional.

2. Even if the constitutionality of the aforesaid provision is upheld the Illinois State Officers Electoral Board erred in its interpretation of Section 4 of Article 10 of the Illinois Code. (This being the so-called "alternative issue.")

There are no allegations, in said complaint contained, showing that these appellees can act without authority from the Illinois State Officers Electoral Board. The pleadings contain no allegations whatever that the appellees have any duty to act, or could legally act, with regard to appellants' candidacies under the final decision of said Board. There are no allegations concerning appellees' authority to perform any acts, of any nature whatsoever, on behalf of appellants' candidates. Said complaint does not show on its face that these appellees have any legal interest herein. Nor is it apparent from the face of the complaint that the interests (if any) of appellants and appellees are conflicting. The complaint does not show any legal relation between appellants and these appellees.

A statutory three-judge court composed of Judges Kerner (of the Circuit Court of Appeals), Sullivan (of the District Court) and Igoe (of the District Court) was convened pursuant to Section 2881 of the New Judicial Code because interlocutory injunction was prayed.

The appellees (hereinafter described) appeared by counsel, and resisted the plaintiffs' motion for an interlocutory injunction. Counsel for the appellees argued and submitted briefs in support of their opposition to the motion. Appellants appeared by counsel, argued and submitted briefs. American Civil Liberties Union was allowed to file its brief *amicus curiae*.

After hearing the arguments of counsel and considering the briefs of the parties and of *amicus curiae* the court dismissed the verified complaint.

### **Findings of Fact and Conclusions of Law Below.**

The statutory three-judge court entered Findings of Fact and Conclusions of Law, a copy of which is appended to this brief as EXHIBIT A.

### **Appellants.**

The appellants have described themselves in paragraphs numbered three (3) to twelve (12) inclusive, (Pages 1-2, Complaint) as citizens and various Progressive Party candidates for different offices. The Progressive Party is also named as an appellant.

### **Appellees.**

This brief and argument is submitted on behalf of Michael J. Flynn, Individually and as County Clerk of Cook County, Illinois, The Board of Election Commissioners of the City of Chicago and Harry A. Lipsky, Individually and as Chairman of, and William B. Daly and Mabel Reinecke, Individually and as Commissioners of The Board of Election Commissioners of the City of Chicago. Being those who, of the hundred odd appellees, named herein, appeared and argued below.

### **Briefs and Arguments of Appellants and the Attorney General of the State of Illinois.**

By order of this Court briefs are due on Saturday, October 16, 1948. Since that order was entered, October 13, 1948, none of the parties have been able to examine each others briefs. We therefore, wish to point out that we, as well as the other parties, have been unable to reply to the several briefs to be filed herein. Lack of such reply is not intended as a waiver of any points.

### **Statement Opposing Jurisdiction.**

Appellants motion to advance and expedite hearing of this case having been granted October 13, 1948 did not give appellees sufficient time within which to prepare their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm. Not having done so, is not intended to be a waiver of any contentions that would have been set forth on such pleadings. This brief and argument contains virtually the same matters.

### **Grounds on Which Appellees Opposed the Motion for Interlocutory Injunction.**

These defendants resisted the Motion for injunctive relief on the following grounds, which were also a challenge of the District Courts' jurisdiction of the subject-matter. We argue these contentions in the Argument portion hereinafter contained.

1. Appellants, by their Complaint, undertake to invoke the aid of the Court to prescribe the method by which to conduct general elections in the State of Illinois, although the Congress of the United States has left the regulations and conduct of general elections to the several states.

2. There is no actual controversy between the parties to this action which will give the Court jurisdiction to grant the declaratory and injunctive relief prayed for in the motion and complaint.

3. The only relief demanded in the Complaint is of a political nature and an Equity Court has no jurisdiction over a suit to protect allegedly invaded political rights.

4. Relief can only be granted under the Federal Declaratory Judgment Act, in question, when an actual controversy between the parties exists.

5. The 1935 Amendment to Section 2 of Article I Illinois Election Code (Sec. 10-2, Ch. 46, Ill. Rev. Stat. 1947) pleaded by appellants is not so clearly repugnant to nor in violation of, any provision of the Constitution of the United States as to warrant the granting of an interlocutory injunction.

6. The Complaint is in the nature of a "pseudo" appeal from the decision of the Illinois State Officers Electoral Board and the Court does not have jurisdiction to review the decision of said Board, nor can it inquire into or examine its findings and rulings for error or any other purpose.

7. The Court is without power to grant declaratory relief or injunctive relief predicated thereupon, or in anticipation of such declaratory relief, in the absence of an actual controversy within the meaning and purview of the new Federal Declaratory Judgment Act. (Sec. 2201, C. 151, Title 28, U. S. Code, September 1, 1948.)

8. Appellants have failed to show any substantial claim of unconstitutionality of the Illinois statute. Therefore their complaint and motion for an interlocutory injunction are wholly without merit.

9. The complaint and memorandum of law demonstrate that the alleged federal question is without substance; therefore the Complaint and motion for an interlocutory injunction should be dismissed and denied.

10. The findings and decision of the Illinois State Officers Electoral Board is not before the Court. Nor can this Court rule upon the propriety or correctness of said Board's interpretation of Illinois Law.

The following points and authorities are offered in support of the foregoing contentions and are relied upon for affirmance of the order, and judgment below, denying the motion for interlocutory injunction and dismissing the complaint.

## POINTS AND AUTHORITIES.

### I.

**THE ISSUES INVOLVED ARE OF A PECULIARLY  
POLITICAL NATURE, THEREFORE NOT MEET  
FOR JUDICIAL DETERMINATION.**

#### A.

The subject matter is not of equitable cognizance.

- *Colegrove v. Green*, 328 U. S. 549.
- *Guaranty Trust Co. v. New York*, 326 U. S. 99.
- *Great Lakes v. Huffman*, 319 U. S. 293.
- *Railroad Commission v. Pullman Co.*, 312 U. S. 496.
- *Giles v. Harris*, 189 U. S. 475.
- *United States v. Reese*, 92 U. S. 215.
- *Minor v. Happersett*, 21 Wall. 162.
- *Green v. Mills* (C.C.A.), 69 F. Supp. 852.
- *Turman v. Duckworth*, 68 F. Supp. 744.
- *Blackman v. Stone*, 17 F. Supp. 102.
- Sections 9 and 10 of Article 10, Illinois Election Code (pars. 9-10, 10-10, ch. 46, Ill. Rev. Stat., 1947).

### II.

**THE CASE BELOW WAS A PROCEEDING "DE  
NOVO". FURTHERMORE, DECISIONS OF THE  
ILLINOIS STATE OFFICERS ELECTORAL BOARD  
ARE FINAL.**

See Argument.

**A.**

**The Declaratory Judgment Act is a remedy only and does not create substantive rights.**

*Aralac, Inc. v. Hat Corporation of America*, 166 F. (2d) 296.

Borchard, *Declaratory Judgments*, 2d Edition, Page 233.

**B.**

**Neither the Illinois State Officers Electoral Board nor the Supreme Court of Illinois construed the state or federal constitutions on the issues urged here. Appellants did not at any time raise constitutional questions before said Board.**

See Argument.

**III.**

**THE COURT IS WITHOUT POWER TO GRANT DECLARATORY RELIEF IN THE ABSENCE OF "ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE NEW DECLARATORY JUDGMENT ACT.**

**A.**

**The interests of appellants and appellees are not conflicting: these appellees are without legal interest in the issues.**

Chapter 151, Title 28, U. S. Code (effective Sept. 1, 1948).

Section 10 of Article 10, Ill. Election Code (Ill. Rev. Stat., 1947, ch. 46, par. 10-10).

*Aralac, Inc. v. Hat Corporation of America*, 166 F. (2d) 286.

## IV.

**THE CONSTITUTIONALITY OF THE 1935 AMENDMENT TO SECTION 2, OF ARTICLE 10, ILLINOIS ELECTION CODE IS NOW A MOOT QUESTION.**

See Argument.

## V.

**IT IS THE DUTY OF COURTS TO SO CONSTRUE ACTS OF LEGISLATURE AS TO UPHOLD THEIR CONSTITUTIONALITY AND VALIDITY IF IT CAN BE DONE, AND TO AUTHORIZE A COURT TO HOLD A LAW UNCONSTITUTIONAL. ITS REPUGNANCE TO THE ORGANIC LAW MUST CLEARLY APPEAR.**

*Mutual Film Co. v. Industrial Commission of Ohio,*  
215 Fed. Rep. 138.

## A.

**Appellants failed to show any substantial claim of unconstitutionality.**

*United Drug Co. v. Graves, Governor of Ala.,* 34  
F. (2d) 808.

## ARGUMENT.

---

### I.

**THE ISSUES HERE INVOLVED ARE OF A PECU-  
LIARLY POLITICAL NATURE, THEREFORE NOT  
MEET FOR JUDICIAL DETERMINATION.\***

### A.

**The subject matter is not of equitable cognizance.**

This case does not involve a criminal statute about a political matter, not a statutory right of action for damages. Hence, it does not fit in certain specific legal compartments labeled by prior decisions of this Court. The right to vote is not involved here on the usual level of inquiry.

Appellants, here, are not claiming jurisdiction because of diversity of citizenship and amount in controversy, they rely solely upon purported violation of several provisions of the United States Constitution. (Paragraphs 37, 38, Page 9, Complaint.)

The Constitution of the United States does not confer the right of suffrage upon anyone. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627.

Guaranty against discrimination on account of race, color or previous condition of servitude is the only new constitutional right vested in citizens of the United States by the 14th and 15th Amendments. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563.

Stripped of verbiage, appellants' basic contention is that

---

\* *Colegrove v. Green*, 328 U. S. 549, *infra*.

the Constitution of the United States requires the signature of each voter to carry equal force with that of every other voter, or that all voters' signatures should be equally effective, one with the other. And, therefore, the Illinois Election Code (Ill. Rev. Stat., 1947, Ch. 46, Sec. 10-2) signature requirement violates certain provisions of the United States Constitution.

That is the core of the case upon which appellants proceed for equitable relief.

That equity cannot interfere with elections or intervene in political matters is fundamental. Even invocation of the Civil Rights Act will not supply a patent deficiency in cases of this type.

The case of *Giles v. Harris*, 189 U. S. 475, involved equitable relief under the Civil Rights Act, and this Court, speaking through Mr. Justice Holmes, there said, at page 486:

"It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of § 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green v. Mills*, 69 Fed. Rep. 852. • • •"

The cases of *Turman v. Duckworth*, 68 F. Supp. 744, and *Blackman v. Stone*, 17 F. Supp. 102, although not authoritative in this Court, reflect a line of decisions which explore the prevailing rule regarding equity's interference in matters of this nature.

“We quote pertinent language from those two cases, not as controlling in this Court, but as more apt and skilled illustrations of the proposition urged by us.”

“Equitable relief in a federal court,” this Court said in *Guaranty Trust Company v. New York*, 326 U. S. 99, “is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.”

In *Great Lakes v. Huffman*, 319 U. S. 293, this Court said:

“The Declaratory Judgments Act was not devised to deprive Courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles.”

In the course of the opinion delivered by Mr. Justice Holmes, in *Giles v. Harris*, 189 U. S. 475, the following appears at page 486:

\*In *Turman v. Duckworth*, 68 Federal Sup. 744, cited above, “the Circuit Court of Appeals, Atlanta Division, said at page 748:

“Our system of government, State and federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy. In our federal government under its Constitution each State has in the Senate two ‘unit votes,’ wholly regardless of population, in the making of all laws, and in conforming treaties and appointments to federal offices. These unit votes also appear in the electoral college in choosing a president, so that there have been presidents who did not receive a majority of the popular votes. The people of the District of Columbia have no vote in their government but are ruled by a Congress elected wholly by others. Touching nominations, all the great political parties in their State and national organizations have followed in their nominating conventions the legislative strength of the States or counties represented, thinking that not to be irrational . . .”

Appeal to this Court dismissed. 329 U. S. 675. (See also 330 U. S. 804.)

The case of *Blackman, et al. v. Stone, et al.* (1936), 17 F. Supp. 102, involved a suit in equity to enjoin certain County Clerks of different Illinois counties, from printing ballots for the election of November 3, 1936, without including thereon the names of candidates designated in plaintiff's petition. In discussing the facts the court said at page 102:

“\* \* \* If we narrow the statement of facts to the fundamental basic questions, it appears that a petition containing over 25,000

"The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. \* \* \*"

Appellants argued extensively regarding *Colegrove v. Green* (June 10, 1946, 328 U. S. 549, aff'g. (N.D. 111. 1946) 64 Fed. Supp. 632, reh'g. den., October 28, 1946) which indicates the great apprehension on their part regarding the obvious weight of that case against their position here.

There this Court dismissed a bill for a declaratory judgment presented by a qualified voter protesting the validity of the apportionment of Illinois into Congressional Districts.

The *Colegrove* case was an appeal from a decree of a District Court of three judges (64 F. Supp. 632) which dismissed the complaint in a suit to restrain state officers from acting pursuant to provisions of a state election law alleged to be invalid under the Federal Constitution. Mr. Justice Frankfurter announced the judgment of the Court. At page 552 (of the majority opinion) it was said:

"In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois." (Emphasis added.)

---

names was filed with the Secretary of State asking that certain individuals named thereon be placed on the ballot as \* \* \* candidates for State and Federal offices; that the plaintiffs represented more than fifty counties and that over 200 such signatures representing electors of each of fifty different counties \* \* \*"

Thereafter, the State Officers Electoral Board held its hearing pursuant to Statute. The court continues:

"At said meeting the candidates made a limited appearance and objected to the jurisdiction of the three justices of the Supreme Court to pass upon the so-called objections. The three justices held that they had jurisdiction and would hear the objections and they demanded that the petition was insufficient."

The aforesaid certainly rings a familiar note in the Complaint here. For in paragraph 32 (Page 7, Complaint) appellants say:

"The said provision of Section 2 of Article 10 of the Illinois Election Code added by amendment in 1935, in view of the marked disparity in the population of the 102 counties of the State of Illinois, is unconstitutional . . . ."

The majority opinion in the *Colegrove* case also states, at pages 553-4:

"It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest *be dressed up in the abstract phrases of the law.*" (Emphasis added.)

In our opinion *Colegrove v. Green* imposes rather stringent limitations on the availability of declaratory relief in constitutional litigation.

At this point, we cannot refrain from commenting that George F. Barrett, Attorney General of the State of Illinois, represented the appellee, as he does here. In that case (*Colegrove*) the Attorney General of the State of Illinois contended that a federal court of equity was without jurisdiction to *interfere by injunction or otherwise with an election or other purely political question.*

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The Court then said at page 103:

"A study of the authorities leaves us in no doubt as to the soundness of the defendants' second proposition, viz., that courts of equity do not assume jurisdiction of suits to protect invaded political rights.

"In Ruling Case Law, volume 10, page 342, we find the following statement:

"Matters of a political character are also outside the pale of a court of equity, no such jurisdiction having ever been conceded to a chancery court, either in a federal or state judiciary, unless it is so provided expressly or impliedly by organic or statute laws. The political rights of a citizen are so sacred as are his rights, to personal liberty or property, but he must go to a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on an ex parte hearing. Neither in England nor America has this power been suffered to extend to political affairs."

Mr. Justice Rutledge concurred with the majority of this Court in *Colegrove v. Green*, 328 U. S. 549, and in his separate opinion said:

"If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the Government and the State. *There is not, and could not be except abstractly, a right of absolute equality in voting.* And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution." (Emphasis added.)

And the Justice continues as follows:

"I think, therefore, the case is one in which the Court may properly, *and should decline to exercise its jurisdiction.* Accordingly, the judgment should be affirmed and I join in that disposition of the cause." (Emphasis added.)

As the Court well knows *Colegrove v. Green*, 328 U. S. 549, was finally disposed of at its October term 1946 (No. 1031). The decision *Per Curiam* appears in 330 U. S. as follows:

"The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. In view of the Court's refusal to grant rehearing in

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And at page 108:

"From a reading of the decisions and the treatises dealing with political and civil rights, we conclude the instant case involves no fact which makes the right to have a name on the ballot a civil right. It is not and can not be successfully argued that any right guaranteed by the Fourteenth Amendment is denied or abridged on 'account of race, color, or previous condition of servitude.' No right here alleged to have been invaded is a civil right. Whether the Supreme Court of Illinois was justified in going so far as to say that in all the cases 'The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate' we need not decide. We do not think that court had in mind a right to vote denied because of color. But, regardless of such limitation, we say there is no civil right here asserted. The

*Colegrove v. Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, 828, and its dismissal of the appeals in *Cook v. Fortson* and *Turman v. Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829, Mr. Justice Rutledge concurs in the dismissal of this appeal. Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy are of the opinion that probable jurisdiction should be noted. • • •

Appellants here contend that Section 2 reduces the effectiveness of their votes and that they are deprived of their right to nominate and vote for candidates of their own choice.

It can readily be perceived that it is not the inherent qualities of Section 2 that directly affects their right to vote. It was the failure to have the requisite *valid* signatures of qualified votes that precipitated appellants' present situation.

A nominating petition containing the requisite number of *VALID* signatures would have qualified the candidates of the Progressive Party. Appellants do not attack the requirement of voters' signatures on nominating petitions, but the number of these required from certain locations. They raise no question that voters' signatures should not be required to nominate a candidate. The fault, they say,

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*only right is the one to have a candidate's name appear on the ballot in the face of an adverse ruling of a duly created election board, the decision of which body not being based on the protected right described in the Fourteenth Amendment. (Emphasis added.)*

"The machinery of election, which the state has provided and which it had the constitutional right to provide has made no distinctions between individuals or persons. It has given to all citizens of Illinois the right to file petitions or to nominate by convention. It has set up machinery which is in every respect reasonable and in no way arbitrary whereby the validity of proceedings by petition may be determined and it has made the body thus created to pass upon the validity of such petitions (in this case the three senior justices of the Supreme Court of Illinois) the final arbiter of the validity of such proceedings (sections 10a-10c of the act Smith-Hurd Ill. Stat. c. 46 §§ 298a-298c). Final authority must rest somewhere. The State of Illinois through its legislature may legiti-

lies in where one has to go to get signatures (par. 48, page 12). It is the "leg-work" that is unconstitutional.

Plainly speaking, then, we are faced here with contentions urged solely because appellants found it too late to go back and get valid signatures from the counties where they lost signatures (or failed to get valid ones in the first instance).

"That is the real point here. It is disguised in the "Alternative Issue" (Pages 1, 12, Complaint). Well knowing there is no appeal from an Illinois Electoral Board, the Progressive Party has urged that Section 2 of Article 10 certainly ought to be unconstitutional so that the Court will supply the deficiency by voiding the signature provision altogether.

None of the allegedly "unfortunate" counties described in paragraphs 33, 34, 35 (Page 8 of the Complaint) are parties to this action. Appellants seek to complain for them.

If the lower court had granted the interlocutory relief prayed for in appellants' motion for interlocutory injunction, then the appellees would be enjoined "from continuing to abstain from certifying" to the Appellee County Clerks

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mately determine how those final arbitrators shall be chosen as well as the qualifications of its members. The judgment of this board may be erroneous; but unless it acted outside its jurisdiction, *its judgment is final and binding*. Its judgment can not be successfully challenged because the challenger believes it acted unwisely or erroneously." (Emphasis added.)

This opinion concludes at page 110, with this language:

"In view of the lack of jurisdiction of this court to grant the relief sought, it is unnecessary and improper to consider plaintiffs' grounds of attack on the action of the Electoral Board. They assert the Electoral Board was without jurisdiction to rule on their petition because the notices required by the statute were not given and because there was no objection to their petition. Defendants take issue with plaintiffs on these points, but we find ourselves without authority to investigate and determine these controverted issues in any equity suit."

The decision was affirmed by the Circuit Court of Appeals (7th Circuit), on other grounds in 101 F. (2d) 500.

the names of the Progressive Party candidates; the Appellee Board of Election Commissioners would be enjoined "from continuing to abstain from printing or causing to have printed on the official ballots for use at the November 2, 1948 general election the names of the candidates originally nominated by the Progressive Party nominating petition."

Such relief would have voided the decision of the Illinois State Board. There being no appeal from that Board it would be completely improper for any court so to do. It should be noted there are no allegations of fraud or claim of any abuse of discretion on the part of the Board. What is truly attempted, here, is to strike down the decision of a lawfully constituted Board, acting under and pursuant to the Statutes of Illinois. Appellants would have this Court, or the lower court, simply eliminate and obliterate the Illinois Board by injunction.

This would be government by injunction and nomination by judicial fiat.

The statute creating and governing the Illinois State Officers Electoral Board (Pars. 10-9, 10-10, ch. 46, Ill. Rev. Stat., 1947) has not been challenged in this proceeding, nor has the authority of the Board been put into issue. The Complaint (Page 11) does set up an "alternative issue" contending that the Electoral Board *erred* in its interpretation of Sec. 4 of Article 10 (Par. 10-4, ch. 46, Ill. Rev. Stat., 1947). But, that is not a matter that could be reviewed in a Declaratory Judgment proceeding.

These appellees would be powerless in face of such an injunction. Each must receive a certification of nomination before he is empowered to act under the Illinois Election Code. Who will certify to them? The Electoral Board cannot be required to reconvene and issue a new decision

(injunctive relief has not been prayed for against that Board).

The real point in the case is that the Progressive Party prepared nominating petitions under Sec. 2 of Article 10, of the Illinois Election Code. Then, when objections to their petition prevailed and reduced the number of signatures, the Progressive Party decided such signature requirement to be conveniently unconstitutional.

The foregoing is predicated upon paragraphs 26, 27, 32 and 48 of the Complaint (Pages 6, 7, 48).

In *Giles v. Harris*, 189 U. S. 475, already cited, at 488, Mr. Justice Holmes said:

"The Circuit Court has no power to bind the State. \* \* \* Unless we are prepared to supervise the voting in that State. \* \* \* it seems to us that all that the Plaintiffs could get from equity would be an empty form."

The Justice declared that if a decree could bind election officials, it would bind the State in violation of sovereign immunity.

In *Giles v. Harris*, 189 U. S. 475, this Court approved the decision in *Green v. Mills* (C.C.A.), 69 F. 852. The *Green* case contains the following:

"It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. \* \* \*"

The power of the State legislature to create and define districts for the election of representatives in Congress is confined by Section 4, Article I of the Federal Constitu-

tion. It is well established that in absence of regulations by Congress, the exercise of the power conferred upon State legislatures by Section 4 of Article I of the Federal Constitution is not restricted by requiring the duty to be performed in any particular manner.

Appellants' urge is that there is a federal requirement of "equality in voting power" that must be adhered to by the Election Code of Illinois. Whatever courts or judges may think of the propriety, advantage or necessity of imposing such a requirement, the question is one with which they are not concerned, because it is beyond the scope of their power or authority. The wisdom, propriety or expediency of a legislative act is exclusively a question for the law-making branch of the government to determine, and a court will not declare a statute invalid because in its judgment the measure may be unwise or detrimental to the best interests of the State. Constitutional limitations afford the only test by which the validity of a statute may be determined.

The right of the State of Illinois to fix the times, places and manner of holding elections for representatives and senators in Congress has not been altered or limited in any respect here pertinent by Congress.

In the case of *Railroad Commission v. Pullman Company*, 312 U. S. 496, 500, this Court said:

"An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the exercise of the sound discretion, which guides the determination of courts of equity." *Beal v. Missouri Pacific R. Co.*, ante, p. 45. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. . . . (cases collected) . . . Few public interests have a higher claim upon the

discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner v. Boykin*, 271 U. S. 240; *Spielman Motor Co. v. Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania v. Williams*, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist v. Interborough Co.*, 279 U. S. 159; cf. *Hawks v. Hamill*, 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. \* \* \* (Emphasis added.)

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of states." from *Great Lakes v. Huffman*, 319 U. S. 293, *supra*.

"The printing of Illinois ballots is now in progress in Illinois' 102 counties. The deadline for printing absentee ballots has already passed" \* \* \*

quoted from Page 2 of Appellants' Motion to advance and expedite this hearing.

In addition to that, we add that the Court will take judicial notice that millions of ballots are required for Cook County, Illinois, alone. In light of this factual situation we recall, and requote, that "the history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." (*Railroad Commission case, supra*, 213 U. S. 496, 500.) Injunctive relief here would indeed precipitate serious public consequences.

## II.

**THE CASE BELOW WAS A PROCEEDING "DE NOVO". FURTHERMORE, DECISIONS OF THE ILLINOIS STATE OFFICERS ELECTORAL BOARD ARE FINAL.**

The "Alternative issue" (Paragraphs 44 to 50 of the Complaint, pages 11 to 13), urged by the appellants, is, in essence, an attempt to obtain a review of the decision of the Illinois State Officers Electoral Board.

We submit this point requires little argument since paragraph 44 (Complaint, page 11) alleges, in substance, "*that even if the constitutionality of the said provision of Section 2 of Article 10 of the Illinois Election should be upheld, the State Officers Electoral Board erred in its interpretation of Section 4 of Article 10 of the Illinois Election Code thereby erroneously barring the Progressive Party candidates. . . .*" (Emphasis added.)

Such pleading is tantamount to saying if this Court holds the pertinent amendment of Section 2 of Article 10 (Illinois Election Code) constitutional then the decision of the Illinois Electoral Board was in error. We say, even if that Board erred (which we do not admit) this Court cannot review its decision of August 31, 1948 (par. 28, Complaint, page 6).

All decisions of the State Officers Electoral Board are "final" (quoted from Sec. 10, Article 10, Ill. Rev. Stats., 1947) and certainly not subject to any review in the mode and manner pursued by appellants either in the court below or here. The Illinois Election Code does not provide for an appeal from the Board's decision.

But, for the purpose of argument (and not waiving any of our rights by so doing), we say that the appellants have

never raised any objections to the Illinois State Officers Electoral Board nor did appellants raise any constitutional questions before said Board.

The foregoing is borne out by the decision of said Electoral Board, dated August 31, 1948, wherein it is recited in paragraph two (2) thereof as follows:

"That the said objectors and said Progressive Party and the members thereof appeared on the 26th day of August, 1948, before the Electoral Board as *legally constituted* and *no objection* was made as to the qualifications of the members thereof and that this Electoral Board had *jurisdiction* of the *parties* and of the *proceeding* and of the *subject matter*." (Emphasis added.)

That finding is set forth on Page 31 of the Complaint filed herein, and so presented by appellants as Exhibit D in their Complaint. It also appears in our Exhibit A—the findings of fact and conclusions of the three-judge court below.

Furthermore, appellants do not urge, either in their Complaint or in oral arguments of counsel, that the Electoral Board did not have jurisdiction of the parties or subject matter, nor that its members were not properly qualified. The sole allegation urged is that the Board erred in "interpreting" the pertinent statutory section. Such matters cannot be considered by this Court, nor could they have been considered by the District Court.

#### A.

**The Declaratory Judgment Act is a remedy only and does not create substantive rights.**

The case of *Aralac, Inc. v. Hat Corporation of America*, 166 F. 2d 296, cites decisions of this Court as authority for the following propositions:

"The requirements of case or controversy are of

course no less strict under the Declaratory Judgment Act \* \* \* than in case of other suits.' *Altwater v. Freeman*, 319 U. S. 359, at page 363, 63 S. Ct. 1115, 1118, 87 L. Ed. 1450", (Page 290).

And at page 291 it was said as follows:

" 'The operation of the Declaratory Judgment Act is *procedural only*.' " *Hughes, C. J., in Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240, 241, 57 S. Ct. 461, 463, 81 L. Ed. 617, 108 A.L.R. 1000.

" 'It is an axiom that the Declaratory Judgment Act *has not enlarged the jurisdiction of the courts over subject-matter and parties*.' " *Borchard Declaratory Judgments*, 2d Ed., p. 233.

" 'The Act *created no new rights* but introduced an additional remedy of inestimable value. \* \* \* *No new substantive rights* were however created. The controversy is the same as previously.' "

The *Aralac* case was decided February 10, 1948, and contains further appropriate authority. It stands for the proposition that mere averment that a case is brought under the Declaratory Judgment Act is not sufficient. (Cases collected under footnote 4, page 290, of that opinion.) Furthermore, the court must raise the objection (lack of controversy) of its own motion if it is not otherwise presented. (Authorities collected under footnote 4, page 290 of the *Aralac* opinion.)

There is no particular magic in appellants' choice of remedy. The Declaratory Judgment Act will not supply the deficiencies in their complaint. Appellants certainly can not obtain a review of the decision of the Illinois State Officers Electoral Board by a Declaratory Judgment proceeding. Nor will that remedy foster a constitutional issue when the complaint is barren of a true one.

The chaos and confusion that would be caused by immediate injunctive relief, in this case, is readily apparent.

Studied consideration demonstrates that such sudden relief would complicate the status of the appellees under their respective statutory duties; election machinery would grind to a halt pending adjustments, directions, and such other appropriate steps as would be necessary and proper.

**B.**

Neither the Illinois State Officers Electoral Board nor the Supreme Court of Illinois construed the state or federal constitutions on the issues urged here. Appellants did not at any time raise constitutional questions before said Board.

The complaint is utterly devoid of any allegation showing that appellees objected to the State Electoral Board, or that the Progressive Party raised any constitutional questions in the proceedings before said Board. The Supreme Court of Illinois did not hand down any decision when the petition for mandamus was denied. (Par. 30, Complaint, page 7.)

Clearly, the ruling of the Board did not change Section 2 of Article 10, of the Illinois Election Code. It is only the Board's construction of its unequivocal meaning. The decision of the Electoral Board was not rendered on any constitutional issue or question. Obviously, it had no authority so to do even if such issues had been presented to it. The Board could only read and apply the appropriate provisions of the Election Code, and this it did.

## III.

**THE COURT IS WITHOUT POWER TO GRANT DECLARATORY RELIEF IN THE ABSENCE OF "ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE NEW DECLARATORY JUDGMENT ACT.**

## A.

The interests of appellants and appellees are not conflicting: these appellees are without legal interest in the issues.

Appellants proceeded by way of a Declaratory Judgment coupled with injunctive relief, under Section 2201 of the new Judicial Code. (Chapter 151, Title 28, United States Code, effective September 1, 1948.) Section 2201 creates a remedy, and commences with this important phraseology:

"In a case of *actual controversy* \* \* \*" (Emphasis added.)

We will not burden this Court with the appropriate citations bearing upon the requirements of "cases and controversies". Suffice, to say the aforesaid Section speaks for itself, and the cases we discuss develop the prime requisite of an "actual controversy" so as to invoke Federal Courts' jurisdiction in proceedings for a Declaratory Judgment.

It is of further importance to note that Section 2201 is based on title 28, U.S.C., 1940 ed., par. 400, so that our line of our authorities with reference to this Section is still appropriate under the newest Section 2201.

Professor Borchard, in his work on Declaratory Judgments (1941—2nd edition) points out at page 29, that " \* \* \* the action must be adversary in character, that

is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interests, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justifiable."

The State Officers Electoral Board, after a full hearing, announced its decision on August 31, 1948, finding that the Progressive Party was not entitled to have its candidates placed upon the ballots for use at the November 2, 1948 general election to be held in the State of Illinois. (Complaint, Page 6.) That Board has not been made a party to the proceedings before this Court. The Appellees have no duty toward the Appellants as a result of the aforesaid decision. In fact the Appellees are powerless to do otherwise. They have no discretion in the matter. Appellees can only place names of candidates upon a ballot as are duly and properly certified to them by virtue of the Illinois Election Code.

Section 10, of Article 10 of the Illinois Election Code (sec. 10-10; ch. 46, Ill. Rev. Stat., 1947) provides, among other things, as follows:

"... the decision of a majority of the electoral board *shall be final.*" (Emphasis added)

"Within twenty-four (24) hours after the electoral board has made its decision, it shall transmit, \* \* \* a certified copy of its ruling, \* \* \* to the officer or board with whom the certificate of nomination or nomination papers, as objected to, were on file, and such officer or board *shall abide by and comply with the ruling so made to all intents and purposes.*" (Emphasis added)

The Appellees in the case at bar are abiding by and complying with their respective statutory duties. They

cannot do otherwise. It would be manifestly impossible for them to legally print ballots with the names of those Progressive Party candidates as pleaded in the Complaint. Such action would be a violation of Appellees' statutory duties and obligations. Hence, the Appellees have no conflicting or adverse interests herein. They are legally devoid of interests conflicting, adverse or otherwise. There cannot be an "actual controversy" between Appellants and Appellees, since these appellee public officials are utterly powerless to controvert anything. They have a statutory duty to perform and it is not a discretionary one. There is no margin for anything other than strict performance.

This is borne out by Appellants' prayers (Complaint, Page 15) for a temporary injunction wherein each prayer asks that the Appellees be enjoined "*from continuing to abstain from certifying*" (Emphasis added) candidates of the Progressive Party. We say Appellees abstain from certifying these candidates or printing ballots because they are bound by the mandate of the General Assembly of the State of Illinois. The Illinois Election Code does not permit the Appellees any discretion in the matter here. They certify candidates who qualify under the Code and who are certified to them under the Illinois Election Code. They must print ballots bearing the names of legally qualified candidates. There the matter ends.

In *Aralac, Inc. v. Hat Corporation of America*, 166 F. 2d 286 (1948), the Circuit Court of Appeals, Third District, had before it an action for a declaratory judgment. At page 290, that court said,—citing a decision of this Court as its authority:

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise

test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a *substantial controversy between the parties having adverse legal interests*, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. \* \* \* *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, \* \* \* 312 U. S. 273, 61 St. Ct. 512, 85 L. Ed. 826. See *Creamery Package Mfg. Co. v. Cherry-Burrell Corp.*, 3 Cir. 1940, 115 F. 2d, 980, 983." (Emphasis added.)

Footnote 4, on page 290 of the aforesaid opinion reads as follows:

"If there is no dispute or controversy within the jurisdiction of the court the court should not enter judgment on the merits but dismiss for want of jurisdiction. *Leaver v. Parker*, 9 Cir. 1941, 121, F. 2d 738."

"A 'controversy,' in the sense in which the word is used in the Constitution in defining the judicial power of the Federal courts, must be one that is appropriate for judicial determination as *distinguished from a difference or dispute of a hypothetical or abstract character*, or from one that is academic or moot; must be definite and concrete, touching the legal relations of parties having adverse legal interests; and must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion *advising* what the law would be upon a hypothetical state of facts."

*Aetna Life Ins. Co. v. Edwin P. Haworth et al.*,  
300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108  
A. L. R. 1000.

In the case of *Mills v. Briggs Green*, 159 U. S. 651, 16 S. Ct. 132, 133, 40 L. Ed. 293, it was held:

"The duty of this court as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinion upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

## IV.

**THE CONSTITUTIONALITY OF THE 1935 AMENDMENT TO SECTION 2, OF ARTICLE 10, ILLINOIS ELECTION CODE IS NOW A MOOT QUESTION.**

Appellants proceeded before the Illinois State Officers Electoral Board without interposing any defense, whatsoever, pertaining to the validity of Section 2 of Article 10 (Sec. 10-2, ch. 46, Ill. Rev. Stat., 1947). They did not challenge the constitutionality of Section 2 in the hearing before the Board. Paragraph 2 of the Board's findings (Exhibit "D", pages 30-31 of the Complaint) substantiates this statement, wherein it reads, in part, as follows:

"\* \* \* that this Electoral Board has jurisdiction of the parties and of the proceeding and of the subject matter."

The Progressive Party was duly apprised of the nature and basis of that hearing on objections and the decision of the Board recites: "\* \* \* all notices of the proceeding having been given as required by law, said hearing commenced on August 26, 1948."

Clearly then Appellants knew the signature requirement (they now complain of) under Section 2 of Article 10 was to be the basis of that hearing, yet they remained silent as to the constitutional aspects of that Article. And, it was not until the Board ruled that Appellants first questioned the validity of the 1935 Amendment to Section 2.

They should have objected to the Board's consideration of the case under Section 2, and sought relief at that time, under the Declaratory Judgments Act. In fact that is the ideal situation for a declaratory judgment proceeding.

It is too late now to turn back to the Board proceedings and plead the unconstitutionality of Article 2. The point

became moot after the Board ruled. More especially, since the Board is not a party to this cause and has no way of changing its decision. *The nominating petition, in question, expired with the ruling of the Board.* Injunctive relief cannot give it life.

Under the Illinois Election Code governing the State Officers Electoral Board (Sec. 10-10, ch. 46, Ill. Rev. Stat. 1947):

“ \* \* \* The decision of a majority of the electoral board shall be final.” (Emphasis added).

Hence, it appears that the complaint, filed herein, is an attempt to erase the findings of the Board by injunctive relief.

The Electoral Board was composed of officers of the State of Illinois. If relief, as sought herein, were to be granted it would not only amount to *coercing* the acts of various state officials, but go even deeper, by directing them to ignore the decision of a Board duly constituted under the statutes of Illinois.

## V.

**IT IS THE DUTY OF COURTS TO SO CONSTRUER ACTS OF A LEGISLATURE AS TO UPHOLD THEIR CONSTITUTIONALITY AND VALIDITY IF IT CAN BE DONE, AND TO AUTHORIZE A COURT TO HOLD A LAW UNCONSTITUTIONAL. ITS REPUGNANCE TO THE ORGANIC LAW MUST CLEARLY APPEAR.**

It is a canon of statutory construction that a law will be construed, if possible, in such a way as to render it constitutional if it can be done.

Thus it was said in *Mutual Film Co. v. Industrial Commission of Ohio*, 215 Fed. Rep. 138, the following:

"\* \* \* the 'principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional unless it be plainly and palpably so.' *Booth v. Illinois*, \* \* \* 184 U. S. at page 431, 22 Sup. Crt. at page 428 (46 L. Ed. 623). And, as Judge Donahue expressed the rule prevailing in Ohio: 'A court is not authorized to adjudge a statute unconstitutional where question of its constitutionality is at all doubtful.' *Board of Health v. Greenville*, \* \* \* 86 Ohio St. at page 20, 98 N. E. at page 1021 \* \* \*."

To further sustain our contention on the point we quote from *Federation of Labor v. McAdory*, 325 U. S. 450, 471:

"As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions \* \* \*. Most courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. \* \* \*"

We have discussed this point since it is a prime factor for consideration prior to granting of injunctive relief. Giving the relief, prayed for here, would have had to have been predicated upon an ultimate finding of unconstitutionality.

Paragraph number 1 (Ex. A attached hereto), conclusions of the lower court, hold that Sec. 2, Article 10, Ill. Election Code "is not repugnant to, nor in violation of any provisions of the Constitution of the United States \* \* \*" hence, its denial of the motion for interlocutory injunction was correct and without error.

So, in this case we urge that the interlocutory injunction should not be ordered, and the district court acted correctly. Moreover, such a preliminary injunction would work great injury to all other voters and election officials in the event the portion of Section 2, Article 10, complained of, is held to be constitutional.

The case before this Court involves the general election of November 2, 1948. It is apparent that a temporary injunction, as prayed for, would directly affect that election. Since the weight of authority has always been toward upholding constitutionality of statutes, unless clearly repugnant to organic law, we say Appellants have not yet made out a sufficient case of unconstitutionality to warrant such serious and far reaching injunctive relief, at the interlocutory state of proceedings had below.

### A.

Appellants failed to show any substantial claim of unconstitutionality.

That the question of the unconstitutionality of a state statute must be a substantial one to warrant intervention of three judges in cases in which preliminary injunctions are sought to restrain enforcement of a state statute under Judicial Code, par. 266, amended, and in *United Drug Co. v. Graves, Governor of Alabama*, 34 F. 2d 808, at page 255, it was said:

"In *Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391 we had occasion to observe that 'the three judge procedure is an extraordinary one, imposing a heavy burden on federal courts with attendant expense and delay;' . . . We concluded that 'when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed.' The court further said at page 255:

" . . . although the bill of complaint had been previously filed, and a *motion for an interlocutory injunction presented*, it was apparent after our decisions in the cases cited that the federal question was without substance and it became the duty of the District Court to dismiss the bill on complaint of that ground." (Emphasis added). *Wylie et al., v.*

*State Board of Equalization of California*, 21 F. Supp. 604 stands for the broad proposition that a "substantial claim of unconstitutionality must appear before" a three judge court will take jurisdiction under Federal statutes governing suits to enjoin enforcement, operation, or execution of a *state statute for the unconstitutionality* thereof, and, 'in the absence of such claim, even diversity of citizenships would not confer jurisdiction.' " (Collection of cases at page 605 of the opinion).

Appellants are, in essence, complaining about signature requirements prescribed by the legislature of the State of Illinois. The relief they seek would result in waiving those requirements for their benefit. They might well argue that only 199 signatures should be required from each of 50 counties or 201 signatures from 49 counties. We think this is a matter for legislative action and not appropriate for the judicial branch of the government.

### SUMMARY.

The district court correctly ruled that it was "without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board \* \* \*". Its other conclusion of law was that the provisions of Sec. 2 of Article 10, here complained of is not repugnant to, or in violation of any provisions of the Constitution of the United States nor does it contravene Sec. 18, Art. II of the Illinois Constitution. Thus, this latter conclusion of law sustains its reasons for denying the motion for interlocutory injunction.

The findings of fact by the district court dispose of the appellants' contentions. Especially paragraph 3 (page 2, Ex. A) that "No objection was made to the qualifications of the members thereof (the Board) or that the Electoral Board did not have jurisdiction of the parties,

of the proceedings, and of the subject matter." (Emphasis added.)

Failure by appellants to obtain the requisite valid signatures on their nominating petitions does not warrant destruction or reprinting of millions of ballots in Cook County, Illinois, nor vast numbers of ballots in the rest of the State of Illinois.

We say the three-judge court did not err in denying the motion for an interlocutory injunction.

### Conclusion.

For the reasons urged in this brief, we respectfully submit that this Court should either dismiss this appeal or sustain and affirm the order and judgment appealed from the District Court.

Respectfully submitted,

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**EXHIBIT "A"**

DISTRICT COURT OF THE UNITED STATES  
FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Curtis D. MacDougall, et al.,  
*Plaintiffs,*

v.

Dwight H. Green, Individually  
and as Governor of the State  
of Illinois, et al.,

*Defendants.*

No. 48 C 1406

**Findings of Fact and Conclusions of Law.**

This cause coming on to be heard on the Plaintiffs' verified complaint as amended and motion for an interlocutory injunction and the Court, having heard argument of counsel and having considered the briefs of the parties and of *amicus curiae* and being fully advised in the premises, does make and adopt the following findings of fact and conclusions of law;

**Findings of Fact.**

1. This is an action of a civil nature brought under Sec. 2201 of the Declaratory Judgment Act, 28, c. 151, United States Code, effective September 1, 1948.

2. The individual defendants are citizens and residents of the State of Illinois; they claim to be candidates of a new political party known as "The Progressive Party" for United States senator from the State of Illinois, Electors for president and vice president of the United States

from the State of Illinois and for certain public offices of the State of Illinois; they seek the entry of an interlocutory injunction that the defendants Dwight H. Green, Arthur C. Lueder and Edward J. Barrett, Governor, Auditor of Public Accounts, and Secretary of State of Illinois, respectively, be directed to certify to the respective county clerks of the State of Illinois, as the candidates of The Progressive Party, the names of the persons named in the complaint.

3. That on August 16, 1948 a declaration of intention to form a new State wide political party and a petition to nominate candidates for that party was filed by and on behalf of The Progressive Party pursuant to the provisions of Article 10 of the Illinois Election Code; said nominating petition, together with the statements of candidacy of the individual candidates, was presented to the Governor, the Auditor of Public Accounts, and the Secretary of State for the State of Illinois for endorsement and filed in the office of Secretary of State as required by law; That on August 21, 1948 certain legal voters of the State of Illinois filed objections to said nominating petition and thereafter on August 26, 1948 the State Officers Electoral Board, the body provided for by law to hear and pass upon objections to nominating petitions filed pursuant to Article 10 of the Illinois Election Code, convened in the Capitol Building in Springfield, Illinois. The objectors and the Progressive Party and the members thereof appeared before the Board. No objection was made to the qualifications of the members thereof or that the Electoral Board did not have jurisdiction of the parties, of the proceedings, and of the subject matter.

4. Said Board received evidence and heard arguments on behalf of the parties interested from August 26, 1948 to August 31, 1948, and on August 31 found as a fact "That

the nominating petition filed on behalf of the said candidates of The Progressive Party does not include the signatures of 200 qualified voters from each of at least 50 counties within this State as required by statute for the nomination of said candidates for such public office, and is therefor insufficient in law as a nominating petition," and that the purported petition was not sufficient in law to entitle the said candidates' name to appear on the ballot for use at November 2, 1948 general election.

### Conclusions of Law.

1. The provisions of Sec. 2 of Article 10, (Sec. 10-2, c. 46, Ill. Rev. Stat. 1947), requiring for a valid nominating petition at least two hundred signatures of qualified voters from each of at least fifty counties is not repugnant to, nor in violation of any provisions of the Constitution of the United States, nor does it contravene Sec. 18, Article II of the Constitution of Illinois.
2. This Court is without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board of August 31, 1948 and to hold that the Board's decision is null and void.
3. The motion for the interlocutory injunction will be denied.

OTTO KERNER,

*Judge U. S. Court of Appeals*

PHILIP L. SULLIVAN,

*Judge U. S. District Court*

M. L. IGOE,

*Judge U. S. District Court.*

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, A. D. 1948.

**No. 348**

CURTIS D. MacDOUGALL, et al.,

*Appellants,*

vs.

DWIGHT H. GREEN, Individually and as Governor of  
the State of Illinois, et al.,

*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
~~FOR THE NORTHERN DISTRICT OF ILLINOIS,~~  
EASTERN DIVISION.

**BRIEF OF THE ATTORNEY GENERAL OF ILLINOIS  
ON BEHALF OF DWIGHT H. GREEN, GOVERNOR,  
ETC., ET AL.**

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**WILLIAM C. WINES,**

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*Of Counsel.*

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IN THE  
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OCTOBER TERM, A. D. 1948.

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**No. 348**

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*Appellees.*

---

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.**

---

**BRIEF OF THE ATTORNEY GENERAL OF ILLINOIS  
ON BEHALF OF DWIGHT H. GREEN, GOVERNOR,  
ETC., ET AL.**

---

**STATEMENT OF THE CASE.**

---

**Appellees On Whose Behalf this Brief is Filed.**

This brief is filed upon behalf of the Governor, the Auditor and the Secretary of State of Illinois, whom only the Attorney General of Illinois has authority to represent (*Fergus v. Russel*, 270 Ill. 304), and seventeen county clerks, named in the record, whose respective state's

attorneys have requested the Attorney General to appear for them.

### **Reference to the Decision Below, Which Is Not Reported.**

The District Court's decision was embodied in findings of fact, conclusions of law and that court's judgment. No opinion was written. Since this court has ordered the cause to stand upon the typewritten record, which is now on file in Washington and is not accessible to counsel writing this brief, it is not possible for us to cite the page of the record where the findings, conclusions and judgment will be found.

The conclusion and order denying temporary injunction, but not the formal recitals of fact that precede them, are quoted, *post*, p. 6.

### **The Position of the Attorney General of Illinois in this Case.**

For the reasons hereafter briefly stated and developed, the Attorney General of Illinois is of the view that appellants' complaint is well conceived in substantive federal law, that according to the teachings of four of the seven justices in *Colegrove v. Green*, 328 U. S. 549, the triumverate District Court had jurisdiction to grant the relief prayed notwithstanding the political character of this litigation, and that the District Court's judgment ought to be reversed with appropriate directions.

Nevertheless, because the issues tendered by this case are of grave import and have never been directly passed upon by this Court, the Attorney General asks this Court to consider this brief, neither as a confession of error nor as primarily an advocate's argument, but rather in the nature of an *amicus curiae* presentation of the reasons that lead the Attorney General to the conviction above stated.

### A Concise Statement of the Facts of the Case.

Prior to 1935, the Illinois Election Code authorized the formation of "new political parties" by the party's sponsors' filing with the Secretary of State a declaration of intention to form a new party. Such a declaration was required to name the party, name its candidates at the next general election, give their addresses, comply with other formalities not material in this case, and bear the signatures of at least 25,000 qualified Illinois electors (Cahill's Ill. Rev. Stats. 1933, Ch. 46, par. 205, p. 1279). All of these provisions and requirements are retained in the Act as it presently stands. No question is raised with respect to them.

In 1935, however, the statute was so amended that it incorporated the additional requirement that at least 200 of the electors' signatures should come from residents of at least fifty of Illinois' 102 counties. (Ill. Rev. Stats. 1935, Ch. 46, par. 205, p. 1483).

At least 86 per cent of Illinois' voters live in forty-nine counties. Over half of Illinois' electors live in Cook County alone.

In short, the 1935 amendment, if valid, would make it impossible for 86 per cent of the Illinois electorate to nominate a candidate for any state office, for United States senator, or for congressman-at-large.<sup>1</sup> But only 25,000 voters from any 50 of the 51 least populous counties could

<sup>1</sup> Illinois enacted a new congressional reapportionment act in 1947 after this Court's decision in *Colegrove v. Green*, 328 U.S. 549, had focused attention upon the gross inequalities in Illinois' gerrymandered congressional districts. Therefore there will be no congressman at large from Illinois in 1949 and thereafter. But Illinois did have a congressman at large in 1935, when the amendment was passed, and will continue to have one until after the 1948 election.

nominate an entire ticket, providing only that at least 200 signatures were obtained from each of such 50 counties.

Appellant Progressive Party is a nascent political party in Illinois.<sup>2</sup> Its prospective candidates for the November 2, 1948 election for the offices of presidential and vice-presidential electors, United States senator, and Illinois state constitutional offices filed with the Secretary of State a declaration which, upon its face, appeared to comply with all of the requirements of the Illinois statute, including the requirement that at least 200 signatures be obtained from each of 50 counties.

Applicable Illinois statutes provide in substance that the validity and sufficiency of a new party's declaration of intention be passed upon by the Illinois State Officers Electoral Board, a statutory administrative agency composed of state officers who act *ex-officio* as members of the Board. (Ill. Rev. Stats. 1947, Ch. 46, pars. 10-9, 10-10. pp. 1576, 1577.)

The Board held the Progressive Party's declaration insufficient on the sole ground that of the 75,000 signatures that it bore, a considerable number were invalid either because they were spurious or because their signers had voted in the April, 1948, statewide primary. When the signatures thus found invalid were disregarded, there were less than 200 valid signatures from each of 50 counties.

Appellants conceive that the 1935 amendment to the Illinois Election Code enacted an inequality in electoral potential so egregious as to render that amendment violative of the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment. Appellants further contend that, with respect to the office of United States senator, the amendment violates the sense of the Seventeenth Amendment, which appellants read as

<sup>2</sup>The Progressive Party is an entity capable of sustaining the role of party plaintiff in litigation under the law of Illinois. Its members can be represented as a class by its party officers, its candidates and representative members. (Cf. *Progressive Party v. Flynn*, 400 Ill. 102.)

requiring substantial equality of suffrage, not only in the general election of United States Senators, but in the nomination of senatorial candidates.

Most (but not all) of the instant appellants sought the Illinois Supreme Court's leave to file in that court an original petition for *mandamus*. That court denied leave to file such petition by memorandum rescript without opinion.<sup>3</sup>

Petitioners then filed the instant suit, which in its procedural aspects follows the example of the proceedings in *Colegrove v. Green*, 328 U. S. 549, seeking temporary and permanent injunction, declaratory judgment and other relief from the enforcement, direct or indirect, of the 1935 amendment, which they assailed as unconstitutional.

The declaration filed with the Secretary of State contained the names of certain persons who had voted in Republican or Democratic primaries and who were therefore disqualified, under the Illinois statute, as signatories for a petition seeking the nomination of persons *for the same offices that were voted upon at the Illinois primary election of April 13, 1948*, raising a question of Illinois statutory law (Ill. Rev. Stats. 1947, Ch. 46, par. 10-4, p. 1574) discussed *post*. Appellants contend that the Illinois Election Code did not, under the Illinois law, disqualify such persons as Illinois signatories on the Progressive Party petition *for the offices of presidential and vice-presidential electors* since those offices were not voted upon at the April 13, 1948 primary election.

It is not possible to determine whether the Illinois Supreme Court intended its unexplained denial of leave to file as an adjudication on the merits (Cf. *Bowen v. Hughes*, 370 Ill. 255) or because it probably tendered issues of fact (Cf. *White v. Ragen*, 324 U.S. 760, recognizing that the Illinois Supreme Court is not bound to entertain, and will not usually entertain, original proceedings for *mandamus* that tender issues of fact that it had no facilities to try.) *Certiorari* from this Court would therefore have been unavailing. This was directly held in *White v. Ragen*, cited above.

But *Colegrove v. Green*, 328 U.S. 549, makes it clear that in any event, when political emergency is immediate, it is not necessary to exhaust state remedies if the time before election is so short that it would be impossible for a case to proceed from the state *nisi prius* court to this Court before the election is to be held.

### **The District Court's Decision.**

The District Court's conclusions of law, proceeded by formal recitals that we do not quote, were as follows.

"1. The provisions of § 2 of Article X (§ 10-2, c. 46, Ill. Rev. Stat. 1947) requiring for a valid nominating petition at least two hundred signatures of qualified voters from each of at least fifty counties is not repugnant to, nor in violation of any provisions of the Constitution of the United States, nor does it contravene § 18 Article II of the Constitution of Illinois.

"2. This Court is without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board of August 31, 1948 and to hold that the board's election is null and void.

"3. The motion for the interlocutory injunction will be denied."

### **The Questions Presented.**

1. Does the patent, gross and undisputed inequality in electoral potential enacted by the challenged 1935 amendment to the Illinois Election Code deny privileges and immunities, due process of law or equal protection under the Fourteenth Amendment?

### **Comment on this Question.**

"Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. \* \* \* (Snowden v. Hughes, 321 U. S. 1, at p. 11, citing *McPherson v. Blacker*, 146 U. S. 1, 23-4; *Nixon v. Herndon*, 273 U. S. 536, 538; *Nixon v. Condon*, 286 U. S. 73).

Insofar as state offices only are concerned, the concept of "federal privileges and immunities" may not be applicable. (*Snowden v. Hughes*, *supra*). But the right to vote for United States senator, being conferred by the Seventeenth Amendment, would seem

to be a "privilege" federal in character and therefore now deriving protection from the Fourteenth as well as the Seventeenth Amendment. The right to vote, although certainly not "property," would seem to be a "liberty" under "a republican form of government."

A question remains, however, as to whether flagrant inequity in electoral potential is unconstitutional when it is based upon geographical considerations. (Cf. the gross inequalities in the case of representation in the United States Senate and in the matter of a choice of president and vice president.) The Attorney General of Illinois submits, for reasons discussed in the Argument, *post*, that a state may not grossly discriminate between the voting strength of its citizens for offices, state or federal, to which election is by state-wide suffrage without infringing the equal protection clause of the Fourteenth Amendment.

2. Does the 1935 legislation deny to the inhabitants of Illinois a "republican form of government" and therefore violate Section 4 of Article IV of the Constitution?

3. If the Fourteenth Amendment does not vitiate the 1935 Illinois enactment, is that enactment nevertheless unconstitutional with respect to elections to the office of United States senator because the Seventeenth Amendment intends that United States senators shall be chosen as a result of equality of suffrage?

4. If the Seventeenth Amendment vitiates the 1935 amendment with respect to the office of United States senator, does the entire amendment fail because it cannot be assumed that the legislature would have passed it had that assembly realized that the amendment was invalid with respect to the senatorial office?

5. If the federal constitutional questions are decided adversely to appellants, did the District Court have jurisdiction to hold, and should it have held, that, upon a reading of state law, there were sufficient valid signatures with

respect to the office of presidential and vice presidential elector as to entitle the Progressive Party to a place on the ballot as to those offices only?

6. Does this Court have jurisdiction to decide the questions presented by this record?

7. If jurisdiction exists, should it be exerted or should its exercise be forborne?

### **Possible Solutions of These Questions.**

This Court could, without overruling any directly applicable case, without departing from any recognized canon of constitutional doctrine and not without logic, reach any one of the following solutions to these questions:

1. The gross inequality of electoral potential enacted by the 1935 amendment denies equal protection and vitiates that whole amendment. Therefore the District Court should have granted relief by declaratory judgment and, if necessary, by injunction to restrain the holding of an election to which the Progressive Party would be excluded from the ballot.

2. This Court might hold that the Fourteenth Amendment does not nullify the 1935 amendment to the Illinois Election Code but the Seventeenth Amendment frustrates it as to the office of United States senator only. The Court would then have to hold either

A. That the 1935 amendment is valid as to all offices except that of United States senator

or

B. Although the amendment is void only as to the office of United States senator under the Seventeenth Amendment, this emasculation deforms it into an enactment that the legislature would presumably not have passed had it known that it was not validly legislating with respect to the senatorial office. In

this latter case, the whole amendment would fail even though the *reason* for the failure were to be found only in the Seventeenth Amendment.

But should this Court hold that a state may virtually disfranchise 86 per cent of its inhabitants in its 49 most populous counties, so far as forming new political parties is concerned, by making their power of nomination contingent upon cooperation of a very small number of persons in 53 less populous counties, it would, in the opinion of the Attorney General of Illinois, sanction a flagrant denial of federal constitutional rights.

Finally, should the Court approve this gross inequality so far as the Federal Constitution is concerned, it could either accede to or reject appellants' contention that under a proper construction of the Illinois Election Code the Progressive Party's declaration was valid as to the offices of presidential and vice presidential electors because those offices were not the subject for nomination in the primary election in which certain of the Progressive Party's signatories disqualified themselves by voting in Republican or Democratic primaries.

## ARGUMENT.

### I.

The District Court and this Court have jurisdiction of the controversy presented by this case. No ground exists for forbearing the exercise of that jurisdiction if appellants' rights are well conceived.

In *Colegrove v. Green*, 328 U. S. 549, four of the seven justices participating in the decision expressed the view that equity had jurisdiction to act, by injunction, declaratory judgment or otherwise, to prevent a state or its officials from holding an election that would violate substantial federal constitutional rights.<sup>4</sup> The justices so concurring reached their opinions notwithstanding earnest argument to the contrary by the Attorney General of Illinois.

It is true that Mr. Justice Rutledge cast his vote for affirmance in the *Colegrove* case. But he did so upon the ground, present there and absent here, that the exigencies of the *Colegrove* case were such that had the Court granted the relief sought, it would have left Illinois without any apportionment act whatever and would have precipitated

<sup>4</sup>Mr. Justice Black, speaking for himself, Mr. Justice Douglas and Mr. Justice Murphy, said (p. 568): "It is my judgment that the District Court had jurisdiction; that the complaint presented a justiciable case and controversy; and that appellants had standing to sue, since the facts alleged show that they have been injured as individuals." Mr. Justice Rutledge said (p. 564): But for the ruling in *Smiley v. Holm*, 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, \* \* \* would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree." Thus, although Mr. Justice Rutledge does imply a measure of dubiety as to the soundness of the rationale upon which this Court's jurisdiction of political controversies has been vindicated, he recognized the justiciability of questions of the sort presented in this case.

a political chaos with no corresponding benefit to the social polity of Illinois.

That no comparable reason for abstention from exercise of jurisdiction in the present case exists is simply and quickly shown by the following reflections:

*Suppose that Illinois election officials were threatening to print a ballot and omit therefrom the Democratic or Republican ticket.* Every exponent of the cause of political liberty in the United States would be aghast if this Court were to recognize its jurisdiction to prevent such an outrage, as four of the seven justices recognized the existence of jurisdiction in the *Colegrove* case, but were to forbear to exercise it upon the considerations, aptly described by Mr. Justice Rutledge in the *Colegrove* case because they existed there, of delicate regard for the organism of state government.

If, as appellants assert and as we believe, the 1935 amendment is unconstitutional, the inequity done to the Progressive Party is as clear, although it may not be as striking to the public mind, as would the disfranchisement under the pretext of unconstitutional state legislation of one of the nation's great political parties so far as the State of Illinois is concerned.

Unless the teachings of a majority of the Court in *Colegrove v. Green* are to be repudiated, the issues tendered by this case are justiciable in the District Court and in this Court if the federal questions are substantial. That the questions are substantial would seem to admit of no doubt. Their substance can best be judged by a consideration of the merits of appellants' contentions, which contentions are considered in the remaining Points of this brief.

## II.

**Does the 1935 Illinois Amendment to the Illinois Election Code violate the Fourteenth Amendment and the "Republican Form of Government" clause of Article IV, Section 4 of the United States Constitution?**

"Where discrimination is sufficiently shown," this Court said in *Snowden v. Hughes*, 321 U. S. 1 at page 11, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." And nomination as well as final election of state and federal officers is within the purview of constitutional protection insofar as nomination is accomplished under the auspices of state government. *U. S. v. Classic*, 313 U. S. 299; *Smith v. Allwright*, 321 U. S. 649.

In the present case "discrimination is sufficiently shown;" for it is shown beyond all peradventure. If substantial equality of electoral potential is required by the concept of "equal protection" or of "a republican form of government," both of which are guaranteed by the Constitution of the United States, the 1935 amendment is arrantly unconstitutional; for it certainly denies such equality.

The only question remaining, then, is:

**Is substantial equality of suffrage a general principle of the constitutional philosophy of the United States?**

The "rotten boroughs" of England were an outrageous grievance against which all political libertarians, British and American, were vehemently protesting at the time of the birth of the United States and of the writing of the Constitution. Parity of suffrage was the thesis of the political egalitarianism of France, from which philosophy

much of the political and governmental doctrine of the Constitution was derived, English tradition expressing itself in the "civil rights" provisions of the constitution and its first ten amendments. Equality of franchise was the theme around which the post Civil War amendments were written. The term "gerrymander" is an old one in the political lexicon and means a flagrant injustice accomplished by giving some citizens far more voting power than is given to others.

Against these considerations may be urged the observation that there is not even approximate equality of representation in the United States Senate or in the electoral college. But this inequality of representation, although specifically authorized by the Constitution of the United States, ensues from the fact that the United States is a federation of forty-eight separate sovereignties. Equality of sovereignty requires that one house of Congress contain an equal number of "ambassadors from sovereign states," which are *quasi* nations, even though equality of sovereignty frustrates equality of suffrage in the Senate.

But inequality of senatorial representation as among the inhabitants of the several states is balanced by or compensated for by representation in the House of Representatives, where representation is reformed every ten years in order to insure approximation toward equality of suffrage. Flagrant inequality in the matter of voting is certainly contrary to any concept of "republican form of government" as an American norm of political organization.

We think that the 1935 amendment violates the terms of the "republican form of government" guaranty expressed in section 4 of Article IV of the Constitution. But even if the "republican form of government" guaranty may

not be specifically invoked by appellants, certainly that guaranty may be consulted as a canon which informs and gives meaning to the concept of "equal protection" assured by the Fourteenth Amendment.

It would serve no useful purpose to extend further this demonstration of the stark fact that the 1935 amendment denies political equality and therefore denies "equal protection" to the citizens of Illinois under a "republican form of government."

Does the 1935 amendment deny federal "privileges" and "immunities"? Since the right to vote for a United States senator is guaranteed by the Seventeenth amendment, that right is clearly a "federal privilege." The effect of the Seventeenth Amendment is briefly considered under Point III, *post*. We advert to it here only because that right, being a federal privilege, is protected by the "privileges and immunities" clauses of the Fourteenth Amendment.

These considerations seem to us so clear as to render academic the question whether the due process clause is violated. However, we cannot forbear expression of our view that the right to vote is a "liberty" which is denied by legislation as arbitrary as that in the Act assailed in this case.

## III.

**Does the 1935 amendment to the Election Code violate the Seventeenth Amendment to the Constitution of the United States?**

The Seventeenth Amendment provides:

"The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; \* \* \*" (Emphasis supplied.)

The phrase "*elected by the people thereof*" would seem to import a categorical command that at least substantial, if not, indeed, approximate, equality of suffrage is requisite, not only in the matter of the general election of senators from among candidates previously nominated, but in the process of nomination itself.

The Seventeenth Amendment does not appear to contemplate the choice of senators under state auspices such that there is gross inequality in the voting power of the "people" by whom the United States senators are to be "elected."

If the 1935 amendment is unconstitutional as to United States senators, it would seem that it is invalid in its entirety. Certainly the legislature would not have passed the 1935 amendment at all in anything like its present form if it had supposed that the amendment would be effective as to all offices except that of United States senator.

"No provision however unobjectionable in itself can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall." *Lynch v. United States*, 292 U. S. 571. "In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court." *Dorchy v. Kansas*, 264 U. S. 286.

## IV.

**The Question of State Statutory Law.**

Where substantial federal questions exist; this Court's jurisdiction is properly invoked; and though those questions be decided adversely to the litigants who gain access to the federal courts because they presented substantial federal questions upon which they did not prevail, the Court may retain jurisdiction to dispose of the case upon questions of state law. *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Hurn v. Oursler*, 289 U. S. 238; *Hillsborough v. Cromwell*, 326 U. S. 620.

Paragraph 10-4 of Article 10 of the Illinois Election Code (Ill. Rev. Stats. 1947, Ch. 46, par. 10-4, p. 1574), which was relied upon to invalidate the signatures on the Progressive Party's declaration of those persons who had voted in the April, 1948, Republican primary, provides as follows:

"Provided further, that any person who has already voted at a primary election held to nominate a candidate or candidates for any office or offices, to be voted upon at any certain election, shall not be qualified to sign a petition of nomination for a candidate or candidates for the same offices, to be voted upon at the same certain election." (Emphasis supplied.)

Now in Illinois presidential electors are not nominated at a primary election. *Therefore no one could have voted in such a primary for a presidential elector.* It is plain that under the applicable Illinois law, many of the signatures on the Progressive Party's declaration, although they were invalid insofar as the nomination of state officers are concerned, were valid so far as presidential electors are concerned. The Illinois Electoral Board held many signatures totally ineffective because the signatories had voted in either the Republican or Democratic primary in April,

1948. These signatures were in such numbers that, if they be regarded as effective with respect to presidential electors who were not voted upon in that primary, the declaration clearly entitles the Progressive Party presidential and vice-presidential candidates to have their names placed upon the ballot under the Illinois law.

We are aware of this Court's policy of abstention in deciding cases involving questions of state law. (Cf. *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496). But that policy of abstention is a counsel of circumspection, not an inhibition of jurisdiction. It assumes adequate means of realizing rights in state courts.

Once the Supreme Court of Illinois denied appellants leave to file an original petition for *mandamus*, it would not have been feasible to litigate the state questions in a state court; for Illinois' trial and appellate court practice are not such that any such litigation could conceivably have been terminated before the election.

## V.

**If the 1935 Amendment is unconstitutional, appellants are entitled to the relief which they seek.**

Various Illinois statutes fix various dates on or before which various public officials must perform various acts in order to validate ballots. Such statutes require, for example, certification by election boards and other official acts. These statutes are not attacked in this case. But if their enforcement in *this case* were to frustrate appellants' rights when those rights have been denied because the Illinois State Officers Electoral Board acted upon the 1935 amendment as though it were constitutional, then constitutional rights would be denied by a pretext and subterfuge.

The District Court or this Court has jurisdiction to take such measures, by injunction, declaratory judgment or otherwise, as will insure that if appellants have any constitutional rights in this case, those rights will not be nullified by the application of statutes which, though intrinsically valid, cannot be constitutionally invoked to inhibit appellants' liberty of suffrage.

### **Conclusion.**

The Attorney General submits this case to this Court upon the considerations suggested and developed above.

Respectfully submitted,

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